

VOLUME IV  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA

vs.

5:11-CR-602

JOSEPH VINCENT JENKINS,

Defendant.

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Transcript of a Jury Trial held on February 6,  
2014, at the James Hanley Federal Building, 100  
South Clinton Street, Syracuse, New York, the  
HONORABLE GLENN T. SUDDABY, United States District  
Judge, Presiding.

A P P E A R A N C E S

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## I N D E X   O F   T E S T I M O N Y

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Chad Willard	658	--	--	--
recalled	752	753	--	--

1 (Open Court, Jury Out, 9:07 a.m.)

2 THE COURT: Good morning. Counsel, it's still your  
3 intention to rest?

4 MR. GOLDSMITH: Yes.

5 THE COURT: Okay. Then what we're going to do is  
6 we'll bring the jury in, we'll let you rest your case before  
7 the jury, and then we'll start with closing arguments. Go  
8 ahead.

9 MS. THOMSON: We do have one very brief rebuttal  
10 witness. We have one additional witness.

11 THE COURT: Oh, you have, you want to call a  
12 rebuttal witness, okay, we can do that. And then we'll do  
13 closings. Regarding closings, are you going to reserve time  
14 for rebuttal or how do you want to --

15 MS. CARROLL: Yes, I think so, your Honor. Ten  
16 minutes.

17 THE COURT: Okay. I'm not asking how much time, I  
18 just want to see if you were -- okay, that's fine. You can  
19 do a rebuttal. All right. If everybody's ready, let's bring  
20 the jury in, please.

21 (Jury Present, 9:08 a.m.)

22 THE COURT: Good morning, ladies and gentlemen.  
23 Traveling a little easier this morning? It's good to see you  
24 all here. Hopefully you had a nice night, all rested and  
25 ready to go. Mr. Goldsmith, does the defendant wish to call

1 any more witnesses?

2 MR. GOLDSMITH: No, your Honor. At this time,  
3 defense rests.

4 THE COURT: Okay. Defense has rested its case.  
5 Does the government have any rebuttal witnesses?

6 MS. THOMSON: Yes, your Honor, would the court like  
7 us to call the witness at this time?

8 THE COURT: Yes, please.

9 MS. THOMSON: The United States calls to the stand  
10 Special Agent Chad Willard.

11 THE CLERK: You're still under oath.

12 THE COURT: You can step right up, Special Agent,  
13 I'm going to instruct you that you are still under oath.

14 THE WITNESS: I understand that.

15 THE COURT: Okay.

16

17 C H A D W I L L A R D , recalled as a  
18 witness and being previously duly sworn, testifies  
19 as follows:

20 DIRECT EXAMINATION BY MS. THOMSON:

21 Q Good morning.

22 A Good morning.

23 Q Can you tell us where you work for Homeland Security,  
24 where are you physically located?

25 A Alexandria Bay, New York, I am on the second floor of

1 the port of entry there.

2 Q When people come to the border from Canada into the  
3 United States, are you part of that process, part of their  
4 entry into the United States?

5 A No, I am not.

6 Q What function do you have at the border?

7 A I'm a criminal investigator. If one of the people  
8 during their inspections found a violation of federal law, I  
9 would be brought into the process, but I do not perform  
10 inspections, I do the criminal investigations.

11 Q Who performs those inspections?

12 A Customs and Border Protection officers.

13 Q On September 13th, 2010, did you encounter the  
14 defendant Joseph Jenkins at the border?

15 A No, I did not.

16 Q Did you ever see him on that day?

17 A No, I did not.

18 Q When's the first time you ever saw the defendant?

19 A On 10/4 of 2011 when I arrested him at his parents'  
20 home where he resides.

21 Q On September 13, 2010, had you opened your  
22 investigation?

23 A No, I hadn't.

24 MS. THOMSON: I have no further questions.

25 MR. GOLDSMITH: No questions, your Honor.

1 THE COURT: You may step down, sir.

2 (The witness was excused.)

3 THE COURT: Does the government have any further  
4 witnesses?

5 MS. THOMSON: No, your Honor.

6 THE COURT: Government rests?

7 MS. THOMSON: Yes, your Honor.

8 THE COURT: Okay. Ladies and gentlemen, that  
9 concludes the proof in this trial, both sides have rested  
10 their case. The next step is to hear closing arguments, and  
11 we're going to do that now, okay. When you're ready,  
12 Counsel.

13 MS. CARROLL: May it please the court.

14 THE COURT: I'm sorry?

15 MS. CARROLL: May it please the court.

16 THE COURT: Yes, go ahead.

17 MS. CARROLL: At the beginning of this trial, the  
18 government stood in front of you and said the proof would  
19 establish beyond a reasonable doubt that on May 24th, 2009,  
20 the defendant, Joseph Jenkins, transported and possessed from  
21 the United States into Canada images of child pornography and  
22 that he did so knowingly. And that is exactly what the  
23 evidence consistently, methodically, and for the most part  
24 without any impeachment, established.

25 There are actually seven things that are really not

1 up for dispute. Seven crucial facts that have not been  
2 impeached, that the evidence has established, that witness  
3 after witness has testified to.

4 The first one is that the person driving that 2003  
5 blue Dodge Ram was the defendant. Joseph Jenkins. The  
6 defendant himself acknowledged that, and you heard from five  
7 CBSA officers who all said the defendant was the person  
8 behind the wheel of that vehicle.

9 The second is that the defendant was the only  
10 person in that vehicle, sole occupant, and the driver.

11 The third is that that vehicle moved from  
12 Alexandria Bay in Jefferson County in the United States  
13 across the foreign border into Canada to the port of  
14 Lansdowne. No dispute about that. The evidence showed it,  
15 the defendant acknowledged it.

16 The next thing the evidence established and that  
17 has not been contradicted is that in the vehicle that the  
18 defendant owned and was driving, there was a black Toshiba  
19 computer, a black laptop bag containing a silver Compaq, an  
20 8-gigabyte USB drive and a 4-gigabyte USB drive. No dispute  
21 about that. You heard from Officers Johnston, Garrah, Hache,  
22 Melany Boyd, that that is exactly what was contained in the  
23 defendant's vehicle. And further, the defendant himself  
24 acknowledged it. Yes, absolutely, that black Toshiba was in  
25 the vehicle. And do you remember when he said what the

1 officers said, what Tristan Garrah, what Jarret Johnston,  
2 what Glen Hache said was correct, he said, yeah, they were  
3 correct, except about him being nervous, but everything else,  
4 everything else except about him being nervous, that was all  
5 right, that was all true. Well, each of those officers said  
6 that in that defendant's 2003 Dodge Ram, there was a laptop  
7 bag containing a Compaq computer and an 8-gigabyte and  
8 4-gigabyte USB drive. So that fact remains undisputed. In  
9 the car defendant owned, the defendant was driving, there  
10 were those digital media items.

11 The next fact that is undisputed is that on each of  
12 those digital media items, there were images and videos of  
13 child pornography. You heard from certified forensic  
14 examiner Brian Braisted who examined the black Toshiba  
15 computer and the 2-gigabyte and the 4-gigabyte and the  
16 8-gigabyte USB drives, that he found videos and pictures of  
17 child pornography on the black Toshiba, on the 8-gigabyte,  
18 and the 4-gigabyte. And that was undisputed. In fact,  
19 that's consistent with what the defendant himself  
20 acknowledged. In that jail call where the defendant says,  
21 yes, the numbers are wrong, it's not actually 3800, it's more  
22 like a hundred, but the defendant does not dispute the  
23 presence of child pornography on the digital media found in  
24 his car that he was driving over the border on May 24th,  
25 2009. And the forensics bear out the defendant's admission.



1 Brian Braisted testified that on the black Toshiba he found  
2 594 pictures of child pornography. 594, in the system volume  
3 information and in the thumb caches. He also told you that  
4 he found at least three videos of child pornography.

5 Now among those images and videos that Brian  
6 Braisted found on the black Toshiba laptop belonging to the  
7 defendant, there was a video called Vicky. You saw a lot of  
8 Vicky during this trial. Not nearly as much as is contained  
9 in the whole video clip, but you saw her through more than  
10 one witness. And you heard from Special Agent Joshua Findley  
11 that Vicky is a real girl. At the time that video was made,  
12 she was 10 years old. The video the defendant had on the  
13 8-gigabyte USB drive and on the black Toshiba laptop featured  
14 Vicky, at 10 years old, being abused by her father. And you  
15 heard from Joshua Findley that that was a real person, that  
16 she was a minor at the time the video was taken, that he has  
17 met her and that he has talked to her. And that is the video  
18 that Brian Braisted found on the defendant's computer.

19 Also on the defendant's computer, Brian Braisted  
20 found something called a Green Bath series image. You heard  
21 from Special Agent Justin Myers that Green Bath is another  
22 known victim. The Green Bath has been circulated all over  
23 the internet and that Green Bath, like Vicky, features a real  
24 child, a girl who was between 8 and 10 years old at the time  
25 that the images found on the defendant's computer were taken,

1 and that those images were taken by her father. And Brian  
2 Braisted confirmed, without impeachment, that Green Bath was  
3 present on the defendant's black Toshiba laptop.

4 On the 8-gigabyte USB drive, Brian Braisted found  
5 15 child pornography pictures. 15. And there's no issue  
6 there about whether they were stored in a place the defendant  
7 couldn't access or if they were somehow cached because they  
8 were active. They were right there. All you had to do to  
9 find those 15 child pornography pictures was plug the USB  
10 drive into a computer and double click. Just like with the  
11 Vicky video. All you had to do was double click on the image  
12 in New Folder 2 and up that video pops. Same thing with the  
13 Green Bath picture. Same thing with the pictures found on  
14 the 8-gigabyte USB drive.

15 On the 4-gigabyte USB drive, Brian Braisted  
16 testified that he found 3,250 images of child pornography.  
17 Sixteen of those images were sadomasochistic. That means  
18 they featured bondage. He also found 10 video files. Ten  
19 video files readily accessible, all you had to do was plug  
20 the USB drive into a computer and double click. Brian  
21 Braisted testified that among those pictures and videos was  
22 the Vicky video and the Green Bath video. The same Vicky  
23 video found on the 8-gigabyte USB drive. Earlier I said that  
24 Vicky was found on the black Toshiba. Vicky was found on the  
25 8-gigabyte USB drive and on the 4-gigabyte USB drive.

1           On the black Toshiba was a video called KP Nancy.  
2       And you heard from Special Agent Chris McClellan about what  
3       KP Nancy is. KP Nancy, yet another well-known, widely  
4       circulated child pornography series, portraying a real girl.  
5       Chris McClellan met her, confirmed that she was a minor at  
6       the time the video was created, he knows her, she is real and  
7       she was captured on the video that was captured on the  
8       defendant's black Toshiba laptop. The black Toshiba laptop  
9       he fully acknowledged owning. The black Toshiba laptop that  
10      the forensics confirmed he used over and over on a regular  
11      basis. He used it to check e-mail, he used it to send out  
12      work estimates, he used it to pay bills online, he used it to  
13      get e-mail confirmations of Master Card charges, and he did  
14      so as he was looking at images of child pornography. He used  
15      it as part of his integrated system of activity. Used it for  
16      something like a work estimate, watch child pornography,  
17      check it for an e-mail, upload a video to the USB drives.  
18      Both the forensics and the defendant's admission that there  
19      were images of child pornography on that digital media  
20      confirm the existence of child pornography on the black  
21      Toshiba and the USB drives.

22           You heard a lot during this trial about the  
23      Canadian forensic examination. You heard that there may have  
24      been some disparities or some confusion but I want you to  
25      remember the testimony of Detective Constable Kip Wohlert.

1 Kip Wohlert, who did the examination in Canada. Kip Wohlert,  
2 who testified that he found 1600 images of child pornography  
3 on the defendant's digital media and at that point he reached  
4 a saturation point. It wasn't that he found only 1600 images  
5 and there's somehow an inconsistency between Brian Braisted  
6 and Kip Wohlert. No, it was that Kip Wohlert hit 1600 and  
7 decided to stop because there were 10,000 more images. And  
8 as he testified, he didn't need to keep looking. He had  
9 reached the limit he needed to get to. And so he stopped.  
10 Brian Braisted kept looking and found more. That isn't an  
11 inconsistency, in fact it completely corroborates the U.S.  
12 forensic examination.

13 So those six things are really not up for debate.  
14 There is absolutely no factual dispute in the evidence before  
15 you about those six facts. There are, however, three open  
16 questions.

17 First one came up during defendant's testimony.  
18 Did those USB drives, the 4-gigabyte and the 8-gigabyte,  
19 actually belong to the defendant?

20 The second question is, did the defendant knowingly  
21 transport child pornography from the United States into  
22 Canada? And again, the emphasis there is on knowingly. Did  
23 the defendant know about the child pornography he was  
24 bringing into Canada on those USB drives?

25 And the third open question is, did the defendant

1 knowingly possess the child pornography on the black Toshiba  
2 laptop?

3           You will find when you examine the evidence that  
4 the answer to all three questions is beyond a reasonable  
5 doubt yes. Yes, the USB drives belonged to the defendant,  
6 yes, he knowingly transported child pornography into Canada,  
7 and yes, he knowingly possessed child pornography on that  
8 black Toshiba laptop.

9           Now in a minute I'm going to talk a little bit  
10 about the law and later the court will instruct you on the  
11 law. To the extent that anything I say about the law  
12 contradicts or is in conflict with what the court tells you  
13 about the law, the court governs. Listen to the court's  
14 interpretation and instructions on the law. But I'm now  
15 going to walk you through the statutes and the elements of  
16 the offenses that the government has to establish to you  
17 beyond a reasonable doubt.

18           The law is of course a little bit dry and a little  
19 bit dense but it is important for you to consider it in your  
20 deliberations. The defendant is charged in Count 1 with  
21 transportation of child pornography. That offense has four  
22 elements. Four things the government has to establish for  
23 you beyond a reasonable doubt. The first of which is that  
24 the defendant knowingly transported a visual depiction. And  
25 as I said earlier, there is a dispute between the parties,

1 between the government and the defendant about whether the  
2 defendant knowingly transported those USB drives containing  
3 child pornography and knew that there was child pornography  
4 on them.

5 The second element is that the visual depiction was  
6 transported in or affecting interstate or foreign commerce or  
7 the visual depiction was produced using materials that had  
8 been transported in or affecting interstate or foreign  
9 commerce.

10 That is the kind of language that makes people not  
11 want to go to law school, it's the kind of language that  
12 makes my daughter say she wants to be a doctor, not a lawyer,  
13 but it's very simple and I'll explain to you exactly what  
14 that means in just a moment.

15 The third element was that the visual depiction was  
16 child pornography.

17 The fourth element is that the defendant knew of  
18 the sexually explicit nature of the material and the visual  
19 depiction was of an actual minor engaged in that sexually  
20 explicit conduct. Let's go to the next.

21 Element one. A visual depiction. The defendant is  
22 charged with transporting visual depictions. But what the  
23 law requires the government to establish for you is not a  
24 number of images. We do not have to prove to you that the  
25 defendant transported five videos or five pictures or five

1 images or 10 or 100 or 1000 or 3200. What we have to  
2 establish for you is the defendant transported a visual  
3 depiction. One. That is the burden of proof that the  
4 government carries. We must establish beyond a reasonable  
5 doubt a visual depiction was transported from the United  
6 States into Canada.

7 You will hear from the court that an act is done  
8 knowingly, in other words, the defendant knowingly  
9 transported those USB drives, when it is done voluntarily and  
10 intentionally and not because of an accident or mistake or  
11 some other innocent reason. I mentioned to you before that  
12 one of the open questions is whether the defendant knew that  
13 those USB drives were in that bag, whether those USB drives  
14 actually belonged to him and that's really what that element  
15 is talking about. Let's go to the second.

16 Interstate and foreign commerce. The language was  
17 dense, it sounds complicated, it's very easy. The government  
18 has to establish that transportation affected interstate or  
19 foreign commerce and we can do that by proving to you that  
20 the child pornography crossed a foreign border, that the  
21 transportation went from the U.S. into Canada and as I said  
22 earlier, that's really not -- no debate here, we know the  
23 defendant had the media with him when he was in the United  
24 States, we know he drove across the bridge, we know he  
25 crossed the foreign border, we know he was the only person in

1 the car, we know that no one else got into the car on the  
2 bridge between United States and Canada. Beyond a reasonable  
3 doubt, the government has established the effect on  
4 interstate and foreign commerce because the defendant crossed  
5 a foreign border.

6 The next element is that the visual depiction was  
7 child pornography. You will hear from the court a list of  
8 factors that I'm going to go over in a minute on how you can  
9 decide what child pornography really is because ultimately  
10 it's up to you, it is up to you to determine whether the  
11 pictures in that binder, those videos you saw constitute  
12 child pornography. You heard from certified forensic  
13 examiner Brian Braisted who has examined 75 different cases,  
14 thousands, hundreds of thousands of images that he believes  
15 he found numerous, hundreds, thousands of images of child  
16 pornography on the digital media. You heard his description  
17 of the videos, you saw the videos yourself, but the  
18 government does carry the burden of establishing that the  
19 visual depictions were child pornography. When you're trying  
20 to answer that question for yourselves, I ask you just to  
21 look at the pictures. Just think about the videos you saw.  
22 There really cannot be any dispute, the visual images were  
23 child pornography.

24 It's also important for you to know that in order  
25 for the government to meet its burden here, we do not have to



1 establish the exact identity of the minor. We don't have to  
2 do what we did with KP Nancy, with Vicky, with the Green Bath  
3 series, we do not have to tell you the name or the exact age  
4 of the child depicted in the images. In fact, for good  
5 reason, we asked the witnesses not to disclose the specific  
6 real names of those victims because we are trying to honor  
7 their integrity to the extent that it is possible in this  
8 horrible context. It is also important for you to know that  
9 we don't have to establish anything other than the person was  
10 under 18 years old. In KP Nancy, that girl is 14, that girl  
11 is a minor. And her visual depiction constitutes child  
12 pornography when it is done in a sexually explicit way.  
13 These are three of the factors, there are six total, that you  
14 can consider when deciding whether the images and videos  
15 constitute child pornography.

16 First, whether the focal point of the visual  
17 depiction is the child's genitals or pubic area.

18 Second, whether the setting of the visual depiction  
19 makes it appear to be sexually suggestive. Again, think  
20 about those images, and I know they're unpleasant to think  
21 about and I know you looked at them very briefly, but I think  
22 it is absolutely beyond a reasonable doubt the case that  
23 those are pictures that are designed to be sexually  
24 suggestive. That is their very nature. They are designed to  
25 be sexually suggestive.

1           Whether the child is displayed in an unnatural pose  
2           or in inappropriate attire considering the age of the child.  
3           If you think about the images with the children with their  
4           hands and legs bound, that question answers itself.

5           The next factor is whether the child is partially  
6           or fully clothed, or nude, although nudity is not in and of  
7           itself lascivious. You heard from Brian Braisted that he  
8           didn't automatically classify every image and every video as  
9           child pornography. He went through very carefully. He  
10          decided that some images such as those images you saw of the  
11          girl in the bathing suit at the beach, some of those images  
12          are child erotica, they are not child pornography. He was  
13          very rigorous in setting aside what is child pornography and  
14          what is not child pornography. Nudity in and of itself --  
15          not enough to be child pornography. And Brian Braisted said  
16          he considered that when he was deciding which images should  
17          be considered pornographic.

18          The next factor is whether the visual depictions  
19          suggest sexual coyness or willingness to engage in sexual  
20          activity.

21          Finally, whether the visual depiction is intended  
22          to elicit sexual response in the viewer. Again, I think the  
23          answers are found in the images themselves.

24          The fourth element is whether the defendant knew  
25          the material was child pornography. The government is

1 required to establish the defendant knew the images that were  
2 on the digital media were child pornography. The defendant  
3 cannot have it just be the case that it's voluntary or the  
4 defendant cannot have it be the case that it's an accident or  
5 a mistake or there's an innocent reason for that image to be  
6 on the computer. He must voluntarily and intentionally know  
7 that those images are child pornography. However, the  
8 government does not have to prove the defendant has specific  
9 knowledge about the identity of the performer. In the same  
10 way that the government doesn't have to establish to you who  
11 that performer is, who the child is, exactly how old the  
12 child is, the defendant, we do not have to prove that he knew  
13 the exact age or the exact identity of the child. We also  
14 don't have to provide you with eyewitness testimony from  
15 someone saying I saw him looking on the computer, I saw him  
16 downloading images, I saw him on the internet. I was there  
17 with him when he uploaded things to the 8-gigabyte or  
18 4-gigabyte USB drive. We don't need eyewitness testimony.  
19 We can use the kind of evidence we did, the testimony of  
20 certified forensic examiners, timeline evidence,  
21 circumstantial evidence.

22 And finally, the defendant's belief as to the  
23 legality or illegality of the material is irrelevant. It  
24 does not matter if what he thought he was doing was legal.  
25 We don't have to prove that he thought he was violating the

1 law.

2 On Count 1, the transportation of child pornography  
3 into the United States, we allege that that transportation  
4 occurred using the 8-gigabyte and the 4-gigabyte USB drives,  
5 and I mentioned earlier that it is an open question whether  
6 the defendant actually possessed, whether they actually  
7 belonged to him, that 8-gigabyte and 4-gigabyte USB drives.  
8 When you're thinking about that question, I want you to  
9 consider the testimony of the Officer Glen Hache, who as a  
10 routine matter asked the defendant, is this your vehicle, did  
11 you pack the contents of the vehicle. And there was no  
12 ambiguity in the defendant's response, he didn't say, well, I  
13 don't know, this vehicle's actually one that's used by people  
14 I work with and there are all kinds of different people who  
15 put things in and sometimes there are supplies that go from  
16 workers, I don't know. None of that ambiguity came into the  
17 defendant's response when he talked to Officer Hache.

18 What the defendant said on May 24th, 2009, and what  
19 is actually consistent with the evidence is that, yes, he  
20 packed the contents of that vehicle. The vehicle that's  
21 registered to him. The vehicle he was the sole driver of.  
22 The vehicle that held media he openly acknowledged he  
23 possessed, like the black Toshiba laptop. The vehicle that  
24 contained a silver Compaq computer in the same bag as the USB  
25 drives. Do you remember that part of his testimony? The

1 defendant said, you know what, actually, yeah, that silver  
2 Compaq computer, that is mine, no dispute there, the Compaq  
3 that didn't have child pornography on it except for the links  
4 to web pages that Brian Braisted found stored deep, deep in  
5 the data of the computer, that silver Compaq, that's mine,  
6 and yes, that silver Compaq was in the same bag as the USB  
7 drives containing child pornography, and actually, I looked  
8 through the bag before I decided to cross the border, I  
9 looked through the laptop bag, found the silver Compaq, found  
10 some paperwork but I just -- I didn't find the USB drives.  
11 Really? Really? He acknowledged owning the silver Compaq,  
12 he acknowledged to Glen Hache that he is the person who  
13 packed the contents of the vehicle. He acknowledged that he  
14 looked through that bag, and yet somehow he wasn't aware that  
15 there were two USB drives containing thousands of images of  
16 child pornography in that black laptop bag. In the car he  
17 owned. In the car he was driving. In the car registered to  
18 him.

19           You also have the evidence from the USB drives  
20 themselves. You heard from Brian Braisted that the USB  
21 drives are sort of different from a computer. On the black  
22 Toshiba laptop there's a serial number on the outside, right,  
23 the unique identifier, like a fingerprint. That serial  
24 number means that that black Toshiba laptop is unique, that's  
25 the way you mark it as being an individualized laptop. The

1 4-gigabyte and 8-gigabyte USB drives didn't have serial  
2 numbers on the outside. But Brian Braisted told you that  
3 they do have serial numbers, they're embedded electronically  
4 by the manufacturer onto the USB drives. And Brian Braisted  
5 was able to tell you that the serial numbers for the  
6 8-gigabyte and 4-gigabyte USB drives show up on the  
7 defendant's black Toshiba laptop. Conclusively. Those two  
8 USB drives were plugged into the Toshiba laptop the defendant  
9 acknowledged he owned, he acknowledged he used, he  
10 acknowledged was his and was in the vehicle with the same  
11 kind of data contained on the 8-gigabyte and 4-gigabyte USB  
12 drives. We know that those were the USB drives plugged into  
13 the computer because that unique serial number shows up on  
14 the black Toshiba. Not only that, but the data on the black  
15 Toshiba is consistent with that on the 8-gigabyte and  
16 4-gigabyte drives.

17 Brian Braisted testified, and you'll see in  
18 Exhibit 14, that he did a hash value comparison between the  
19 USB drives and the black Toshiba and what that means is once  
20 he had sorted out on the black Toshiba what he considered to  
21 be child pornography, he did a fingerprint comparison. A  
22 hash value is like the fingerprint of a video or image. And  
23 he found 11 overlaps, 11 completely identical images on the  
24 8-gigabyte, 4-gigabyte, and black Toshiba. Exactly  
25 identical. So from the computer the defendant owned, used,

1 operated, was taking into Canada, in the box, his ownership  
2 of that black Toshiba was so complete that he kept the  
3 original box and the original receipts from its purchase, his  
4 ownership of that black Toshiba was so, so incontrovertible  
5 that the only user profile on it was a user named Joe. The  
6 defendant's own first name. On that black Toshiba laptop  
7 that contained images of child pornography, there were 11  
8 overlapping images also found on the USB drives. What are  
9 the chances that that is just a coincidence? What are the  
10 chances that the defendant is just so unlucky that somehow an  
11 8-gigabyte and 4-gigabyte USB drive got planted in his laptop  
12 bag, an 8-gigabyte, 4-gigabyte USB drive that didn't belong  
13 to him, that he had no knowledge of but that had been plugged  
14 into his own computer, plugged into his computer and had data  
15 transferred from the computer to the USB drives. There's a  
16 very interesting timeline for both of those drives that makes  
17 it absolutely the case that the defendant knew that those USB  
18 drives belonged to him. Knew it and used them, used them to  
19 store images of child pornography.

20 You'll remember testimony from Brian Braisted that  
21 he went through the computer and constructed a series of  
22 events based on the forensic data, the record of events in  
23 the Toshiba and in the USB drives.

24 On January 24th, 2009 at 11:49 a.m., user Joe on  
25 the black Toshiba the defendant owned opened an e-mail sent

1 to jjenkins70@rochester.rr.com and that e-mail was about  
2 Master Card charges. At 12:04 p.m., about 15 minutes later,  
3 user Joe, the same user who opened an e-mail sent to the  
4 jjenkins e-mail address, saved three child pornography videos  
5 to the 8-gigabyte USB drive. Those videos were taken from  
6 the Toshiba laptop and put on the USB drive. The USB drive  
7 whose serial number shows up on the Toshiba. It is  
8 absolutely patently incredible that the defendant did not own  
9 that 8-gigabyte USB drive. Of course he owned it. Of course  
10 he owned it. Of course he plugged it into the Toshiba, of  
11 course he transferred images of child pornography from the  
12 Toshiba to the 8-gigabyte USB drive.

13 On the 4-gigabyte USB drive, there is a similarly  
14 damning timeline. On May 22nd, 2009, at 8:20 p.m., the  
15 forensic evidence establishes that user Joe of the black  
16 Toshiba accessed the internet. At 8:46 p.m., so about 20, 25  
17 minutes later, user Joe accessed a website featuring images  
18 of preteen and tween girls. At 8:52 p.m., so a little less  
19 than 10 minutes later, user Joe then accesses a website from  
20 Image Source called "young girls braless and pokies" and you  
21 heard from Brian Braisted that that Image Source website is a  
22 known Russian website that distributes and shares images of  
23 child pornography. And finally, at 10:25 p.m., after  
24 approximately two hours of internet activity, user Joe stops  
25 his activity on the Toshiba and at that point in time, 238



1 images of child pornography and child erotica are transferred  
2 from the black Toshiba to the 4-gigabyte USB drive.

3 They were transferred by the same person who at the  
4 same time was running CCleaner on the black Toshiba laptop.  
5 You heard about CCleaner. CCleaner is wiping software that  
6 is supposed to get rid of data. So at the same time that the  
7 defendant is accessing child pornography on the internet, the  
8 same time that user Joe on that black Toshiba is downloading  
9 images from preteen and tween websites, CCleaner is running.  
10 CCleaner is getting rid of the record of that internet  
11 activity and at the same time the defendant is transferring  
12 the images being uploaded to the Toshiba to the 4-gigabyte  
13 USB drive. Because that's where he keeps it, right? That's  
14 where the real motherlode is. On that 4-gigabyte USB drive,  
15 3,250 images of child pornography. Sadomasochistic images  
16 and 10 videos. It is the defendant who possessed that  
17 4-gigabyte USB drive. It is the same person who accessed his  
18 e-mail, paid his Master Card bill, checked his e-mail again,  
19 went to an internet website featuring child pornography and  
20 uploaded images to the 8-gigabyte and 4-gigabyte USB drive.  
21 These timelines don't leave room for a mysterious person to  
22 come in and plant child pornography on USB drives and then  
23 plant those USB drives in the defendant's laptop bag. What  
24 possible, possible credible explanation can there be for that  
25 series of events other than the one that is consistent with

1 the evidence? Other than the one that is consistent with the  
2 defendant's guilt?

3 In the second count, the defendant is charged with  
4 possession of child pornography. Possession of child  
5 pornography on the black Toshiba laptop. There are four  
6 elements, two of which will sound very familiar. First, the  
7 defendant knowingly possessed a visual depiction. Second,  
8 that the visual depiction was transported in interstate  
9 commerce or was produced using materials transported in or  
10 affecting interstate commerce. Third, that the visual  
11 depiction was child pornography. Fourth, that the defendant  
12 knew of the sexually explicit nature of the material and the  
13 visual depiction was of an actual minor engaged in that  
14 sexually explicit conduct.

15 The third and fourth elements of Count 2 are  
16 identical to those of Count 1, that the visual depiction was  
17 child pornography and the defendant knew it was child  
18 pornography. Count 2, unlike Count 1, alleges possession  
19 rather than transportation. And you will hear from the court  
20 that to possess means to have something within your control.  
21 It doesn't mean you have to hold it physically, to have  
22 actual possession of it. As long as the depiction is within  
23 the defendant's control, he possesses it.

24 You heard a lot during the discussion of the black  
25 Toshiba laptop with Brian Braisted about something called

1 system volume information. SVI. You heard from Brian  
2 Braisted that he found 594 images containing child  
3 pornography on the black Toshiba in the system volume  
4 information of that computer and in thumb caches. During  
5 cross-examination, Brian Braisted was asked if the defendant  
6 would have access to images stored in the system volume  
7 information of the computer. Brian Braisted's answer was  
8 that all it would take was the click of a button to make  
9 those files active. The CCleaner might have tried to wipe  
10 them out, the CCleaner might have tried to destroy their  
11 presence on the Toshiba but all you have to do is restore and  
12 those images become readily accessible. I want you to think  
13 about that when you're listening to the law on the  
14 description of what possession requires. As long as the  
15 visual depiction is within the defendant's control. As long  
16 as the defendant can restore those files to life, as long as  
17 he can click a button and bring them back as active data on  
18 the black Toshiba laptop, he possesses them.

19 Beyond that, you'll see in the indictment when you  
20 go back and review it in the jury room that the government  
21 has alleged on or about May 24th, 2009, the defendant  
22 possessed images on the Toshiba. That language on or about,  
23 the court will instruct you is intentionally approximate.  
24 Because the government does not carry the burden of proving  
25 to you that exactly on May 24th, 2009, the defendant

1 possessed those images. The government has to prove at about  
2 that time, around that time. I bring that to your attention  
3 because I want you to think about Exhibit 3B which contains a  
4 visual description of the Toshiba laptop and a picture of the  
5 Elena file, there's an Elena file on the Toshiba laptop that  
6 gets moved during that transfer of the 238 images, the Elena  
7 picture that is child pornography is on the Toshiba laptop  
8 and then it gets moved over to one of the USB drives. Elena  
9 is child pornography, and on May 22nd, 2009, the evidence  
10 conclusively establishes it was on the laptop. Along with  
11 other images of child pornography. On or about May 24th,  
12 2009. And we've established through Brian Braisted's  
13 forensic examination that on May 22nd, just two days before,  
14 on or about May 24th, there was child pornography on the  
15 defendant's computer. On that black Toshiba. So there are  
16 two different ways in which those images are possessed by the  
17 defendant. First, that he could so easily have restored them  
18 if he chose to do so, and second, on May 22nd he wouldn't  
19 even have had to restore them, they were active, there were  
20 active images of child pornography on May 22nd, 2009.

21 And finally, the defendant is not alleged to have  
22 possessed only picture as opposed to videos, he is alleged to  
23 have possessed videos as well as pictures. And you heard  
24 from Brian Braisted that the videos were not buried in the  
25 system volume information, the videos were not thumb caches,

1 the videos were one click on the desktop away from the  
2 defendant's possession. All he had to do was double click on  
3 New Folder 2 and three video files containing child  
4 pornography would suddenly be viewed. They weren't buried,  
5 they weren't wiped, they never disappeared, they were sitting  
6 right there on the desktop, they were sitting right there on  
7 the desktop able to be accessed by Officer Johnston, able to  
8 be accessed by the defendant. Those videos show he possessed  
9 child pornography on May 24th, 2009 because he hadn't  
10 bothered getting rid of them, he hadn't bothered transferring  
11 those videos to a USB drive, they were sitting right there in  
12 New Folder 2.

13 The second element in the possession charge is that  
14 the visual depiction was transported in or affecting  
15 interstate or foreign commerce, or was produced using  
16 materials that had been transported in or affecting  
17 interstate commerce. I'm sure this testimony seemed a little  
18 strange at the time, you know, why do we care where the  
19 laptop was manufactured. This is why we care, this is why  
20 the government put that evidence before you, because the  
21 Toshiba laptop, the shell of it was manufactured in China,  
22 and the hard drive was manufactured in the Philippines, and  
23 that means the child pornography was possessed on something  
24 that was in or affecting interstate commerce. We had to  
25 bring the black Toshiba into the United States, it wasn't

1 made in New York, it wasn't made in Jefferson County, it had  
2 to cross a foreign border to get here and that's material  
3 that the defendant possessed using the laptop.

4 I said there was another question that was open,  
5 and that was whether the defendant knowingly possessed the  
6 child pornography and transported the child pornography on  
7 the USB drives on the laptop. Again, I want to refer you to  
8 the timeline because the timeline provides conclusive proof  
9 of the defendant's knowledge. His knowing possession, his  
10 knowing transportation. The fact that he knew that there was  
11 child pornography on all three items, the fact that he knew  
12 it, he knew it when he uploaded the images and he knew it  
13 when he transported it and he knew it when he possessed it  
14 because the activity on that computer and the activity on the  
15 USB drives doesn't leave it open for question who's actually  
16 doing it, who's actually uploading the images, who's actually  
17 saving them.

18 January 19th, 2009, at 6 p.m. user Joe creates New  
19 Folder 2 on the desktop. Four seconds later, user Joe saves  
20 five video files of girls age 12 to 14 dancing in their  
21 underwear to New Folder 2. Those videos in total have a  
22 viewing time of 32 minutes and 21 seconds. At 6:33 p.m. just  
23 slightly over 32 minutes and 31 seconds, user Joe opens an  
24 e-mail sent to a password-protected e-mail account in the  
25 name of jjenkins70@rochester.rr.com. An e-mail account the

1 defendant acknowledged was his. So at 6 p.m. New Folder 2 is  
2 created, then 32 minutes' worth of videos are uploaded to New  
3 Folder 2 and then 33 minutes later, just after the viewing  
4 time of those videos, user Joe opens Joseph Jenkins' e-mail  
5 account. Really? A subcontractor, an employee, one of the 2  
6 or 10 or 14 or 20 people who always use this computer? One  
7 of them created New Folder 2, one of them uploaded 32 minutes  
8 worth of child pornography and child erotica, one of them  
9 then opened Joseph Jenkins' e-mail using a secure password?  
10 That explanation strains credulity to the breaking point.

11 This evidence shows that it is the defendant using  
12 that computer, it is the defendant uploading those images, it  
13 is the defendant watching them, saving them, creating them,  
14 and possessing them. It is the defendant doing it, and he is  
15 doing it as part of a daily routine. He is doing it just  
16 after he checks his e-mail.

17 January 20th, next day, 2009. 6:57 a.m., so early  
18 morning, user Joe accesses a child pornography video called  
19 meekrab. At 7:04 a.m., user Joe accesses the IKEA home  
20 planner on the computer. Now what's interesting about this  
21 is that the child pornography video is just under six minutes  
22 in length and just under six minutes pass in between the time  
23 that that video is accessed and user Joe accesses the IKEA  
24 home planning application on the computer. At 7:16 a.m., so  
25 just over 10 minutes later, user Joe opens an e-mail sent to

1 a password-protected account in the name of Joseph Jenkins,  
2 an account Joseph Jenkins said he uses, in an account he said  
3 is his. Of course it's the defendant. Of course it's the  
4 defendant opening the video, watching the video and then  
5 doing what he always does. It's part of his routine. He's  
6 doing it at 6 p.m., he's doing it at 6 a.m., he's checking  
7 his e-mail, he's using the IKEA home planner, because it's  
8 his collection. He is monitoring his collection. He's  
9 treating it the way people treat stamp collections, it is  
10 part of a daily, ordinary course of events for him. It is  
11 the fabric of his life to possess this child pornography. He  
12 does it the same way you check your bank account, he does it  
13 the same way you book airline reservations, it's just part of  
14 what he does on the internet. It's just part of what he uses  
15 his computer for.

16 On February 22nd, 2009, same kind of thing. At  
17 9:14 a.m., user Joe opens an e-mail sent to the Joseph  
18 Jenkins e-mail account. 9:41, user Joe uses Power Point.  
19 10:05 a.m., so about 25 minutes later, user Joe creates the  
20 Zoe folder, and four videos of child pornography are  
21 transferred to that folder. There are eight files total.  
22 Child erotica, child pornography, with a 43-minute viewing  
23 time. And just like always, after that viewing time lapses,  
24 user Joe opens an e-mail sent to  
25 josephjenkins70@rochester.rr.com. Because that's what he



1 does. Right? This is his activity, this is his pattern.  
2 This is his crime. This is what he does. He uses it, he  
3 looks at it, and it becomes part of a routine. So much a  
4 part of his routine that he literally cannot leave his child  
5 pornography at home to go on a week-long vacation in Canada.  
6 So much a part of the daily events of his life he has to pack  
7 it in a Toshiba box and bring it with him to go into Canada,  
8 he can't leave it alone, clearly he can't leave it alone. He  
9 looks at videos, he checks an e-mail, he uploads videos, he  
10 checks his e-mail.

11           You're also going to hear from the court there is a  
12 distinct form of evidence called evidence of flight.  
13 Evidence that can establish the defendant's consciousness of  
14 his guilt. You will hear that if proved, the flight of a  
15 defendant after he knows he has been accused of a crime may  
16 tend to prove the defendant believed he was guilty. When  
17 we're thinking about the defendant's knowledge, whether he  
18 really knew about the child pornography, whether the USB  
19 drives really belonged to him, I want you to think about what  
20 you heard about that Canadian bench warrant because  
21 originally, the defendant is charged in Canada. He's charged  
22 in Canada, he's brought to trial, and there's a delay because  
23 he asks for a stay in the prosecution, he says that he wants  
24 more time. And so the court says, okay, we'll give you more  
25 time, come back October 18th, 2010. But the defendant

1 doesn't come back on October 18th, 2010. Witnesses are  
2 there, they're ready to go, they're lined up, the trial's  
3 going to start, and the defendant is nowhere to be found.  
4 The court issues a warrant for the defendant because he fails  
5 to appear for his own trial, and you heard all kinds of  
6 excuses about that failure. Got the time wrong or his lawyer  
7 didn't tell him or his lawyer told him not to come or the  
8 American lawyer didn't tell him or the lawyers didn't  
9 communicate, or the Canadian investigators messed it up or  
10 the Canadian prosecutor had it wrong or the court wasn't  
11 clear, but the defendant didn't show up. He didn't show up  
12 for his own trial.

13 Do you remember his testimony that his lawyer told  
14 him he didn't have to come to his own trial? Really? The  
15 lawyer who wrote him a letter saying you missed your trial,  
16 they paged you three times, where were you? The defendant  
17 did not appear because he knew he was guilty and he did not  
18 want to stand trial for it. The defendant knew he was going  
19 to be standing trial for an offense he was guilty of in the  
20 same way he knew he possessed that child pornography, in the  
21 same way he knew that he transported it into Canada from the  
22 United States, in the way he knows today that that child  
23 pornography belonged to him, that it was on the USB drives,  
24 that it was on the laptop, that he knew exactly what kind of  
25 material was on that digital media. The way he knew it then,

1 the way he knew when he didn't show up for court in Canada,  
2 and the way he knows it today.

3 The court will tell you that the defendant's  
4 failure to appear in court can be construed as consciousness  
5 of his own guilt. He didn't show up because he did not want  
6 to face the consequences. When you're thinking about the  
7 defendant's knowledge, about whether he actually knew what he  
8 was doing, whether he actually understood what the images  
9 were, I want you to think about the defendant's demeanor and  
10 responses, I want you to think about the defendant himself,  
11 when the defendant was confronted by Officer Hache with the  
12 question, is there child pornography on your computer, do you  
13 have anything like that? He paused. Think about that. He's  
14 being told that he has some of the most offensive material in  
15 Western Civilization on his computer and he pauses, he thinks  
16 about it. And then he says -- not, how dare you, that's  
17 disgusting, I'm shocked, no, of course not. What he says is,  
18 pause, not to my knowledge. That's an awfully carefully  
19 calibrated answer, isn't it? Not to my knowledge. And then  
20 Officer Hache follows up and says, well, have you ever  
21 uploaded anything like that, have you ever had anything like  
22 that? And he says, I don't think so. I don't think so.  
23 Not, no, are you crazy? Not, no, how on earth could you  
24 accuse me of that? He's not shocked, he's not angry. Do you  
25 remember during cross-examination how officer after officer

1 was asked, did defendant have any outbursts? He remained  
2 calm, right, he didn't have any outbursts, he didn't get  
3 angry. Exactly, he didn't get angry. He was being accused  
4 of a horrific, disgusting offense and he didn't get angry.  
5 What he got was scared, what he got was nervous, he turned  
6 red, he sweated, he curled up into a little ball. He did not  
7 express outrage. Because how could he be outraged? He knew  
8 the truth of the question, he knew the truth of the  
9 accusation. Outrage and surprise would have had no place  
10 with the defendant. Because of course he knew about the  
11 child pornography. Of course he wasn't shocked. Two days  
12 earlier he uploaded it to one of the USB drives, it wasn't a  
13 surprise to him. It wasn't a surprise at all.

14 I also want you to think about what each and every  
15 officer told you about their observations of the defendant's  
16 demeanor. The defendant starts out nervous when he gets to  
17 the point of entry and he gets more and more nervous the  
18 closer the Canadian officers get to that digital media. The  
19 closer they get, the worse it gets for him. When he first  
20 shows up at the point of entry, he's all right, you know,  
21 he's gripping the steering wheel and staring straight ahead  
22 and not making eye contact and being evasive but he's not  
23 sweating yet. But what he's doing is bad enough for Pedro  
24 Sousa-Dias to notice it. And then for Melany Boyd to notice  
25 it, for Melany Boyd to notice that he's not making eye

1 contact. He's not really answering her questions directly,  
2 he's not looking at her and he's fidgeting with his hands,  
3 right, he's nervous. And then when Officer Hache asks him  
4 the question about the child pornography, that's when he  
5 really falls apart. That's when the nervousness really  
6 reaches its peak because by then he's not just fidgeting,  
7 he's not just avoiding eye contact, he's turning bright red,  
8 he is curling up into a little ball. He's curling up in a  
9 little ball because he's afraid because he knows exactly what  
10 they're going to find on that computer, he knows what they're  
11 going to find on the USB drives. He knows because he's the  
12 person who put it there. And you can consider all of those  
13 observations that the officers made about the defendant's  
14 demeanor when you consider his state of mind. When you  
15 consider whether he had knowledge.

16 You can also consider the defendant's demeanor on  
17 that witness stand. You can consider how forthright he  
18 seemed. How direct his answers were. How credible his  
19 testimony was. You can and should consider his demeanor  
20 during his testimony yesterday. Do you remember when the  
21 defendant said, I always tell the truth, lady? Let's figure  
22 out if the defendant always tells the truth. If the  
23 defendant is right when he says he always tells the truth,  
24 lady.

25 The defendant said that he had deli meat and cheese

1 in his cooler and so he thought he might get pulled over, and  
2 it might get seized. Because of that, he was a little  
3 anxious because of that but then on cross-examination, no, he  
4 wasn't nervous at all, he was never nervous, the officers  
5 were wrong about that. So that's inconsistent.

6 The defendant testified that the officers who  
7 testified about that search were right about everything, they  
8 got everything right, really no dispute with what they said.  
9 Except there is a dispute about the fact that he was nervous.  
10 He wasn't nervous. He wasn't nervous at all. So that's  
11 another inconsistency.

12 The defendant testified that he always left his  
13 truck at home when he went on vacation. Right, he leaves his  
14 truck there, freely accessible to the handy men and house  
15 sitters and potential child pornography planters who might be  
16 getting into the Dodge Ram to plant USB sticks in the laptop  
17 bag containing his laptop. He always leaves that truck  
18 there, but the defendant was driving his truck on May 24th,  
19 2009. He was driving his truck to go on vacation. So that's  
20 inconsistent.

21 The defendant also testified that at no point  
22 before or during the search of his vehicle and property was  
23 he asked any questions about child pornography but you heard  
24 from Officer Hache that he asked the defendant explicitly  
25 about child pornography, he asked him that question directly

1 and the defendant earlier said that the officers were right  
2 about everything that happened during the search. So how can  
3 they both be right about everything during the search but not  
4 right that he was asked about child pornography?

5 The defendant said that the black Toshiba laptop  
6 was used by a lot of people. The people used it for work,  
7 that various people would come in and do things on it, use  
8 programs, but then under cross-examination he said that he  
9 was the person who owned that computer, he was the person who  
10 used it, and his direct testimony bears that out, right?  
11 He's the user so exclusively that it's his e-mail account  
12 being accessed on that account. Not another e-mail account,  
13 his e-mail account. He uses it so exclusively he's the  
14 person who has the receipt for the computer, he is the person  
15 who has the original case for that computer.

16 You also heard from the defendant that he wasn't  
17 nervous at all during the examination. That he never gets  
18 nervous. That he's not afraid of anything. I want you to  
19 think about how credible the statement the defendant never  
20 gets nervous and that he's not afraid of anything is when you  
21 think about his demeanor during his testimony in this court.  
22 Really? The defendant never gets nervous. He's not afraid  
23 of anything. Then why did he backtrack? Then why did he  
24 change directions when it looked like the wall was coming  
25 down, why did he change his answers? Why did he avoid eye

1 contact? Why did he seem to fidget in the witness stand? He  
2 never gets nervous. The defendant was nervous yesterday when  
3 he was testifying for the same reason he was nervous on  
4 May 24th, 2009. He was nervous because he knows he is  
5 guilty. And the evidence has established that beyond a  
6 reasonable doubt.

7 THE COURT: Counsel, when you're ready, please.

8 MR. GOLDSMITH: Please the court. "Not to my  
9 knowledge." We talked about it at the beginning of the  
10 trial, spoken a lot about it today, we're going to continue  
11 to talk about it, because as the government just argued for  
12 several minutes to you about all of the overwhelming evidence  
13 or the elements of their case, they admitted that what is in  
14 dispute in this courtroom is the knowledge and the intent of  
15 Mr. Jenkins. So when he provided that answer on May 24th of  
16 2009 and he provided the answer yesterday in court on the  
17 witness stand, "not to my knowledge," that's what this is  
18 really about, isn't it? Did he know that the child  
19 pornography was there? Did he know that it had been on those  
20 flash drives?

21 So there are several witnesses that were called at  
22 this trial. Now, Mr. Jenkins himself told you that generally  
23 speaking, the three officers who performed the inspection of  
24 his truck seemed to be accurate. The government brought a  
25 couple of other officers. Officer Sousa-Dias and Officer



1 Boyd discuss the events leading up to that inspection. The  
2 government, with all of those witnesses, chooses to focus on  
3 Mr. Jenkins seemed nervous. Mr. Jenkins seemed nervous. The  
4 government brought up Officer Boyd's testimony of Mr. Jenkins  
5 being nervous. Officer Boyd, who you will recall was at a  
6 counter that she testified was about 15 feet away from the  
7 windows, that all of the other officers who performed the  
8 inspection testified Mr. Jenkins' truck was about another 10  
9 or more feet beyond that. That all of the other officers  
10 testified there was a cap on the truck. That Officer Boyd  
11 said, no, she could see right back into the bed of the truck.

12 So you want to talk about nervous, you want to talk  
13 about is it that one witness that you want to rely upon, but  
14 no, other witnesses said that he seemed nervous, the  
15 government seems to think he seemed nervous on the stand.  
16 But the government really is concerned about why wasn't he  
17 nervous enough. Why wasn't he so upset? Why didn't he  
18 scream and jump and holler when they told him at the border  
19 that they thought that there was child pornography on the  
20 computer?

21 Well, in part of your job in assessing credibility  
22 of the witnesses, assessing the weight of the evidence in  
23 this trial, you're going to look at everything and you're  
24 going to make your determination as a jury. This concern by  
25 the government of why didn't he react stronger at the border,

1 think about it. Think about a saying that's at least 400  
2 years old or 300 years old, from Shakespeare. "The lady doth  
3 protest too much." In life, somebody jumps up and down and  
4 hollers and screams that they had nothing to do with it,  
5 people tend to look at that person more suspiciously because  
6 that is something that seems over the top, incredible. The  
7 same level of incredulity that the government wants you to  
8 think you should assign because Mr. Jenkins didn't jump up  
9 and down and holler. Because he didn't scream protestations.  
10 What did he do? He said not to my knowledge. They asked him  
11 if he had done it, he said I don't think so. Plain, simple,  
12 straightforward responses.

13 There was a lot of testimony from those officers,  
14 the CBSA officers from that day in May of 2009. Talked about  
15 the inspection that they performed of the vehicle, they  
16 talked about the inspection that they performed on the  
17 computer. And there was some testimony about brief  
18 conversations with Mr. Jenkins. Nobody asked him who the  
19 users were, and nobody asked him about passwords. Nobody  
20 asked him about the accessibility of the computer.

21 The government has argued extensively that they  
22 have been able to prove by the evidence that they provided  
23 that Mr. Jenkins was using the computer. Their own expert  
24 testified yesterday this forensic software, everything that  
25 he uses, the equipment that he uses, his training, his

1 experience, none of that can prove who was using the  
2 computers. None of that can prove who was using an e-mail at  
3 a time and accessing an e-mail. All he can show is activity  
4 on the machine.

5 Now on the subject of Special Agent Braisted, he  
6 was careful to discuss with you the necessity for a write  
7 block, testified about it several times. The machine that,  
8 when he's examining or studying a piece of evidence, that  
9 piece of evidence, the computer, or flash drives get plugged  
10 into that device, and that device then gets plugged into his  
11 equipment. Very important, very necessary because he says  
12 that machine and that machine alone, make sure that whatever  
13 contents of the devices being studied does not in any way get  
14 altered by turning on and accessing the computer or the flash  
15 drives. Compare that to the testimony of the CBSA officers  
16 when they were conducting their inspections of the machines  
17 at the border check. They didn't plug it into a write block.  
18 They talked about software, remember, Special Agent Braisted  
19 said, no, this is not software, this is a machine, when they  
20 looked at files and accessed files on this computer.

21 Clearly everything that I argue, that the  
22 government argues, are not controlling in your minds. What's  
23 controlling is your recollection of this evidence. But I  
24 want you to think about the testimony, think about repeatedly  
25 Special Agent Braisted's acknowledgment that his studies

1 cannot confirm who's accessing and who's using the devices.  
2 Then I want you to think about what the government is  
3 presenting to you for several minutes. User Joe, user Joe.  
4 User Joe. User Joe. Because user Joe is the computer  
5 profile user Joe. User Joe is not Joe Jenkins, because user  
6 Joe, a computer showed activity, but Special Agent Braisted's  
7 study couldn't prove, none of the CBSA agents' testimony can  
8 prove, none of the testimony and evidence in this trial can  
9 prove that Joe Jenkins was on the computer when that activity  
10 was going. None of the evidence can prove that Joe Jenkins  
11 was accessing the e-mail.

12 What are the two strongest indicators of that fact?  
13 The government's own evidence. Exhibit 3B, page 20. In the  
14 middle of the screen there's a prompt, pop up, it's asking  
15 for the credentials, the user name and the password to get on  
16 e-mail. What's that box underneath? The box underneath is  
17 something that every one of us who's ever used a computer and  
18 accessed e-mail has seen the last several years, it's the  
19 prompt by the software that says, do you want me to remember  
20 your password? Do you want me to make life easier, so that  
21 you don't have to punch in a user name and password every  
22 time you want to log into this e-mail account? And it's  
23 checked. It's checked.

24 Now Special Agent Braisted testified that the user  
25 name and the password weren't showing, he said it could have

1     been because file wiping software was used and it would have  
2     wiped out a user name and a password. But it's there and  
3     once that user name and password get plugged in, unless the  
4     person unchecks that box, whoever turns that computer on,  
5     whoever accesses that e-mail, goes right into that e-mail  
6     account. There's no security, there's no protection there.  
7     It makes life easier but it also makes life more vulnerable  
8     in that anyone can access what's on that computer or any of  
9     our computers if the password is on there.

10           But even if that wasn't checked, even if the  
11     password hadn't been saved onto the computer into the  
12     software program for the e-mail, what's the other evidence  
13     that we saw at this trial that anyone could have accessed the  
14     e-mail? Exhibit 3B, page 10. It's a text document titled RR  
15     info. Special Agent Braisted was able to pull up, and  
16     Special Agent Braisted testified and as it shows, are the  
17     user names and the passwords for the e-mail accounts that  
18     were on that computer. So if someone was aware of the text  
19     file, and the user name and the password prompt shows up for  
20     e-mail, and they didn't remember, all they had to do was to  
21     look right back up at RR info, and they'd have all the user  
22     names and the passwords readily available.

23           Oh, by the way, also recall that there was no  
24     password protection on the computer itself so when you turned  
25     it on, it immediately went on. You didn't have to type in a

1 password and a user to be able to access the programs of the  
2 computer itself. So this computer, based on the evidence  
3 that you saw at trial and the testimony that you heard from  
4 Special Agent Braisted, had no security whatsoever, was  
5 completely accessible to anyone who had physical access to it  
6 to use, physical access, which Joe Jenkins testified when he  
7 took the stand yesterday. When he described his electrical  
8 business, and he described the people who worked with and for  
9 him, and he described for you the fact that he has a home  
10 office, the fact that the people who worked with and for him  
11 were given the access codes to get into his house so that  
12 they could do work when he wasn't there. The people who  
13 also, once they got into that house, had access to the  
14 computer. The physical access. Once they got to the Toshiba  
15 laptop, well, the user names and the passwords were really  
16 just a formality.

17 At the beginning of the trial, I asked you to  
18 scrutinize the witnesses, scrutinize the evidence, scrutinize  
19 every aspect of this case, look through, consider the  
20 credibility of the CBSA agents, not just credibility but  
21 their capacity, did they have the opportunity to see and to  
22 understand everything that they testified about. Consider  
23 the progress of what happened that day, consider the aspects  
24 of what they testified about for him being nervous, for him  
25 preceding, all right. Now they said he was nervous, but

1 every one of them also said that he was compliant. The  
2 inspection officers talked about Mr. Jenkins sitting or  
3 standing outside while they were inspecting his truck.  
4 Again, the government thinks that he probably should have  
5 been jumping around, that that would have been a better  
6 indication that he was surprised by what was happening. But  
7 why would he be surprised what was happening when he  
8 testified that he'd been over the border numerous times and  
9 he'd been searched a number of times, his car, his vehicle  
10 had been searched a number of times? Think about the  
11 credibility and the capacity, what could every witness do,  
12 see, had the ability to tell you. This is almost five years  
13 ago, and it's been through a number of hands.

14 There was several documents of evidence brought out  
15 by several Canadian witnesses and by American witnesses about  
16 chain of custody. Where this evidence is supposed to go step  
17 by step by step by step. Who had it, what was their purpose,  
18 step by step. One witness wasn't here. Sergeant Detective  
19 Harrington, from the Ontario Police -- I'm sorry, Ontario  
20 Province Police wasn't here. Unfortunately he's ill, he  
21 performed Canadian forensics searches and studies just like  
22 Special Agent Braisted did here in the United States. He  
23 wasn't here to testify about what he did. If you think that  
24 that is something that should be scrutinized and should be  
25 evaluated as far as the evidence goes, you should do that.

1           Think about the credibility of Special Agent  
2   Braisted. His capacity. As an expert. He performs studies,  
3   he undergoes training and education, routinely, as part of  
4   his duties. As a law enforcement officer. But not just any  
5   kind of a law enforcement officer, someone who specializes in  
6   computers and how they work. Even he, with all of his  
7   training, his expertise, his equipment to be able to perform  
8   the studies, couldn't give you an answer as to one of those  
9   three things that the government acknowledged were in  
10   dispute. He couldn't tell you for certain who those users  
11   were. And when we're talking about users, we're talking  
12   about knowledge, which is an element of both of the crimes in  
13   this case. Knowingly possessing pornography. Knowingly  
14   transporting child pornography. Something that was never  
15   established.

16           The subject matter of this case has been  
17   uncomfortable. I asked you in opening arguments and I'm  
18   reminding you again, it's uncomfortable. But it's not -- the  
19   facts and the circumstance of the case, once we move past the  
20   uncomfortableness and you analyze the witnesses, and the  
21   testimony herein, that's where you'll be able to make your  
22   determinations.

23           There was another witness that you heard from, Joe  
24   Jenkins. The defendant in this case. Scrutinize and you'll  
25   make all the same tests and analysis of him as you will every



1 other witness that you saw here at trial. Remember what he  
2 testified about. Compare it with what everyone else is  
3 saying. When you're making your determinations if the  
4 government has proved all of the elements, if it proved that  
5 he had knowledge, recall that he testified about the  
6 accessibility of his computer. Recall that he testified  
7 about the number of people that had access, recall that he  
8 testified that the Compaq computer was essentially a mobile  
9 office for him, that there was always a computer in the  
10 truck. Recall that he testified that the Toshiba laptop was  
11 put in the box with the receipt because he had purchased it  
12 before and wanted to bring it back to the store where he  
13 purchased it to see if it could be returned or serviced.  
14 Recall that he had that knowledge of being searched before.  
15 And as part of your deliberations, as part of your analysis  
16 of whether Joe Jenkins knowingly possessed and trafficked  
17 child pornography, does it add up? Does it add up that  
18 someone who knew that they had illegal merchandise, and who  
19 knew that they were going to be putting themselves in a  
20 position to possibly be searched would bring it?

21 There was also a phone call that was played for  
22 you, phone call from Mr. Jenkins to his mother. A phone call  
23 where he's arguing about numbers and forensics, where he's  
24 arguing about the evidence. That phone call was played for  
25 you because the government felt that it shows that he knew

1     what was on the machines. You heard him testify. That phone  
2     call was not about what he knew was on the machines, that  
3     phone call was him discussing the results of a prior test and  
4     what he believed the prior results showed against what more  
5     current results showed. It was not about what he knew about  
6     these machines.

7             So I want you to go back, and I want you to think  
8     again. Would someone who knew that he had child pornography  
9     on a computer, would someone who knew that there was child  
10    pornography on two of three flash drives, three flash drives  
11    that by the way, Joe Jenkins denied having knowledge of at  
12    all when he was on the stand yesterday, would someone who had  
13    the knowledge that they possessed those materials driving a  
14    truck into a border where he had been stopped and searched on  
15    several occasions before, would he bring that to a place  
16    where he thought he might get searched, or it might get  
17    found?

18            The government wants to make arguments about how he  
19    should have acted if he was really nervous and upset. How  
20    should he have acted if he knew that he had something  
21    illegal?

22            Ladies and gentlemen of the jury, we thank you for  
23    your time and attention, and it is my belief when you go back  
24    into the jury room, and you discuss and you weigh the  
25    evidence and the testimony that's been presented in this

1 case, you will find that the government did not prove all the  
2 elements beyond a reasonable doubt, and you'll find  
3 Mr. Jenkins not guilty. Thank you.

4 THE COURT: Any rebuttal? Yes, okay, go ahead.

5 MS. CARROLL: Ladies and gentlemen, I just want to  
6 make sure it's clear, defendant is charged in Count 1 with  
7 transportation of child pornography on the black Toshiba  
8 laptop. That includes the KP Nancy video that was in New  
9 Folder 2, that was readily accessible to the defendant that  
10 was there on the Toshiba laptop desktop. It could have been  
11 seen easily as soon as you opened the computer and opened New  
12 Folder 2 that contained the KP Nancy video that was on the  
13 black Toshiba laptop, it's the black Toshiba laptop the  
14 defendant is alleged to have transported child pornography  
15 into Canada containing.

16 In Count 2 the defendant is charged with possession  
17 of child pornography on the 8-gigabyte and 4-gigabyte USB  
18 drives. The 8-gigabyte and 4-gigabyte USB drives, 4-gigabyte  
19 contained 3,250 images of child pornography, the 8-gigabyte  
20 that contained videos and images of child pornography. It is  
21 those items of digital media defendant is alleged to have  
22 knowingly possessed child pornography on.

23 The defendant has offered a lot of different  
24 explanations for how there was child pornography on his  
25 computer on May 24th, 2009, how that pornography was found on

1 the 8-gigabyte and 4-gigabyte USB drives. When you consider  
2 the credibility of those explanations, I want you to remember  
3 that those explanations were testified to by the same  
4 defendant who said that Chad Willard, Chad Willard was  
5 present during his harassment at the border, that Chad  
6 Willard was the person who ransacked his vehicle and detained  
7 him for an extended period of time trying to find a cell  
8 phone that they were not able to find.

9 You heard from Chad Willard this morning, he wasn't  
10 there, he wasn't one of the people there. He was not there  
11 during the search of the defendant's vehicle. He was not  
12 there when the defendant was supposedly detained for this  
13 extended period of time.

14 It's that kind of flat contradiction that makes the  
15 defendant's statements about his possession of child  
16 pornography, about the many people who might be responsible  
17 for it, the many people other than him so difficult to  
18 accept. The explanation that the defendant had  
19 subcontractors who worked for him, sometimes as many as 10  
20 people, all of whom would have had access to his computer.  
21 There might be two other people, two partners or two former  
22 partners who had access to the people. The garage was  
23 unlocked so really it could have been anyone. It could have  
24 been a house sitter, there was someone who checked on the  
25 house when he was out of town, maybe it was that person.

1 But when the defendant testified in Canadian court,  
2 he testified about the hardship it posed on him not to be  
3 able to use the internet, he was saying the delay in the  
4 trial had created a great deal of difficulty for him because  
5 he was the only person at his company who was able to use the  
6 computer, and so because he was not allowed to use the  
7 internet, he had to hire somebody. He had to hire somebody  
8 to do all the things that supposedly these 8 or 10 or 50 or  
9 100 other people could have been doing during May 2009. The  
10 defendant's testimony in Canadian court was that he was the  
11 only person responsible for the computer and it was a burden  
12 to him because after he got arrested in Canada, after he was  
13 brought to trial in Canada he had to hire somebody to do the  
14 internet stuff, he had to hire somebody to use the computer.  
15 It's a complete contradiction of his testimony in court  
16 today. In Canada, he testified that he was the only one who  
17 ever had access to the computer and it was a real burden for  
18 him not to be able to access the computer.

19 But then in court yesterday, and during the  
20 argument today, you heard that actually there were two dozen  
21 people who accessed that computer. Let's think about those  
22 two dozen people. Those two dozen people were not mentioned  
23 by the defendant when Glen Hache asked him if he had child  
24 pornography on his computer. Those two dozen people, that  
25 infinite number of people who had access to the garage who

1 could have put the child pornography on, he didn't name one  
2 of them when Marie-Josée Vinette told him that they had found  
3 child pornography on the 8-gigabyte USB drive. The first  
4 time he talked about those people, the first time he  
5 mentioned that there was someone else who might have had  
6 access to the computer was in court today. And yesterday.  
7 That's the first time. And it's the first time because it's  
8 not true. It's not true that there were eight other people  
9 or ten other people or house sitter who put child pornography  
10 on the defendant's computer. That explanation is exactly as  
11 incredible as it sounds. And it is flat contradicted by the  
12 defendant's own previous statement in Canadian court.  
13 Because there were no other people who had access to that  
14 computer. There were no other users, the defendant didn't  
15 even give us a name. Don't you think that if you thought you  
16 were being accused of having child pornography on your  
17 digital media, the first thing you would do if you knew that  
18 other people had access, the first thing you would do is say,  
19 you know what, actually John works for me, John was on my  
20 computer last night. He didn't do that on May 24th, 2009  
21 with Marie-Josée Vinette, he didn't do it in Canadian court  
22 in 2010. He didn't give you a name yesterday in court when  
23 he testified. These numerous people, all of whom could have  
24 framed him in an elaborate conspiracy to have him possess and  
25 transport child pornography, not one of them has a name. Not

1 one. Because it's not a real explanation. It's not a  
2 genuine credible explanation for the evidence. The evidence  
3 that shows that at 6 in the morning, at 10 a.m., at 11 p.m.,  
4 someone, user Joe, is putting child pornography on the  
5 defendant's computer. Who is it who works for the defendant  
6 at 11 p.m., in an electrician company? Who is it at 11 p.m.  
7 who is accessing e-mail and then looking at child  
8 pornography? The explanation makes no sense. It simply does  
9 not hold water but it is consistent with one thing. It's  
10 consistent with the fact that when the defendant is about to  
11 be held accountable for something, when the defendant is on  
12 the hook for something, he looks for somebody else to blame.  
13 When the defendant failed to show up for court, when a bench  
14 warrant was issued for him, it was everybody else's fault but  
15 his. It was his Canadian lawyer's fault, it was his U.S.  
16 lawyer's fault, his lawyer told him not to come, his lawyer  
17 failed to tell him when to come, the investigation had been  
18 so bungled there wasn't any point in coming, he hadn't gotten  
19 full disclosure from the Canadian prosecutor, and finally,  
20 finally, it's just the Canadians generally, the Canadians  
21 messed it all up and that's why I didn't show up for my trial  
22 in Canada. Not because I'm guilty, but because the Canadians  
23 messed it up.

24 The Canadians didn't mess up the investigation that  
25 took place on May 24th, 2009. The Canadians did not make it

1 so the defendant failed to appear for court. The Canadians,  
2 the U.S. lawyers, the U.S. prosecutor, that stupid  
3 prosecutor, none of those people, not the handymen in the  
4 garage, not the subcontractors, not the partners, not the  
5 prosecutors, not the investigators, not the lawyers, none of  
6 those people are responsible for the defendant's possession  
7 and transportation of child pornography. The defendant is  
8 responsible. The defendant is guilty beyond a reasonable  
9 doubt of those offenses. And it is no one's fault but his  
10 own.

11 THE COURT: Okay, ladies and gentlemen, that  
12 concludes the closing arguments of counsel. The next step is  
13 for me to read the law to you. I'm going give you a brief  
14 break before we do that so you can use the facilities,  
15 stretch, be about 10 minutes. Okay. Even though all the  
16 proof is in, summations have been completed, very important  
17 part of the case has not been given to you, so please do not  
18 discuss this case yet, don't form any opinions. Take a short  
19 break and then I'm going to read you the law. Thank you.

20 (Jury Excused, 10:34 a.m.)

21 THE COURT: Okay, we'll take about a 10-minute  
22 break but before we do that, the revised jury instructions  
23 and the jury verdict forms were placed on your tables this  
24 morning. They weren't? They should have been. Just take a  
25 quick look, there's some revisions that we agreed to make,



1 and I'll ask you during the break to take a quick review of  
2 those, and if there's any issues, let me know before we  
3 start. Okay.

4 (Court in recess, 10:35 a.m. to 10:46 a.m.)

5 THE COURT: All right, we're in the courtroom  
6 without the jury, are we all set, had an opportunity to look  
7 at everything?

8 MR. GOLDSMITH: Yeah, your Honor, I've had the  
9 opportunity to review the revised charges and I've noted the  
10 corrections that we've discussed from the charge conference.

11 THE COURT: They've all been made. Government,  
12 same thing, you're all set?

13 MS. CARROLL: Yes, your Honor.

14 THE COURT: Okay. Very well. Bring the jury in  
15 when they're ready, please.

16 (Jury Present.)

17 THE COURT: Okay. Jury's had a brief break, we're  
18 ready to do the charge on the law in this case. Now, I don't  
19 want anybody getting nervous about the length of the  
20 instructions. A copy of what I'm going to read to you is  
21 going to be sent in for you, so that if there's any questions  
22 about what my instructions were, you'll have them there in  
23 front of you. And one of the first things you'll notice in  
24 the jury instructions is that there's a table of contents, so  
25 that if you want to get right to a particular section of the

1 law, you know, somebody has a question, hopefully you can  
2 find it easily, go right to that section and you can find the  
3 area that you're talking about, should that become necessary.

4 Okay. So, first thing we're going to do is we're  
5 going to talk about the roles of the court and the jury.

6 Now that you've heard all the evidence and the  
7 arguments of counsel, it is my duty to instruct you on the  
8 applicable law on this case. Your duty as jurors is to  
9 determine the facts of this case on the basis of the admitted  
10 evidence. Once you have determined the facts, you must  
11 follow the law as I state it and apply the law to the facts  
12 as you find them.

13 You are not to consider one instruction alone as  
14 stating the law, but you are to consider the instructions as  
15 a whole. If an attorney has stated the legal principle  
16 different from any that I state to you in my instructions, it  
17 is my instructions that you must follow. You should not  
18 concern yourself with the wisdom of any rule of law. You are  
19 bound to accept and apply the law as I give it to you,  
20 whether or not you agree with it.

21 In deciding the facts and applying the law of this  
22 case, you must not be swayed by feelings of bias, prejudice,  
23 or sympathy toward any party. The government and the  
24 defendant, as well as the general public, expect you to  
25 carefully and impartially consider all the evidence in this

1 case, follow the law as stated by the court, and reach a  
2 decision regardless of the consequences.

3 Nothing I say in these instructions is to be taken  
4 as any indication that I have any opinion about the facts of  
5 the case or what that opinion may be. It is not my function  
6 to determine the facts, that is your function.

7 Role of the attorneys. The function of the  
8 attorneys is to call your attention to those facts that are  
9 most helpful to their side of the case. What the attorneys  
10 say, however, is not binding on you, and in the final  
11 analysis, your own recollection and interpretation of the  
12 evidence controls your decision.

13 Let me further elaborate on the role of attorneys.  
14 Our courts operate under an adversary system in which we hope  
15 that the truth will emerge through the competing  
16 presentations of adverse parties. It is the role of the  
17 attorneys to press as hard as they can for their respective  
18 positions. In fulfilling that role, they have not only the  
19 right but the obligation to make objections to the  
20 introduction of evidence they feel is improper.

21 The application of rules of evidence is not always  
22 clear, and the attorneys often disagree. It has been my job  
23 as the judge to resolve these disputes. It is important for  
24 you to realize, however, that my rulings on evidentiary  
25 matters have nothing to do with the ultimate merits of the

1 case and are not to be considered as points scored for one  
2 side or the other.

3 Similarly, one cannot help becoming involved with  
4 the personalities and styles of the attorneys. However, it  
5 is important for you as jurors to recognize that this is not  
6 a contest between attorneys. You are to decide this case  
7 solely based on the evidence. Remember, statements and  
8 characterizations of the evidence by the attorneys are not  
9 evidence. Insofar as you find their opening and/or closing  
10 arguments helpful, take advantage of them; but keep in mind  
11 that it is your memory and your evaluation of the evidence in  
12 the case that counts.

13 In addition, you must not infer from anything I've  
14 said during this trial that I hold any views for or against  
15 either the government or the defendant, and in any event, any  
16 opinion I might have is irrelevant to your decision.

17 The government as a party. You are to perform the  
18 duty of finding the facts without bias or prejudice as to any  
19 party. You are to perform your final duty in an attitude of  
20 complete fairness and impartiality. The case is important to  
21 the government because the enforcement of criminal laws is a  
22 matter of prime concern to the community. It is equally  
23 important to the defendant, who is charged with a serious  
24 crime.

25 The fact that the prosecution is brought in the

1 name of the United States of America entitles the government  
2 to no greater consideration than that afforded to any other  
3 party to a litigation. By the same token, it is entitled to  
4 no less consideration. All parties, whether the government  
5 or individuals, stand as equals at the bar of justice.

6 The question before you can never be, will the  
7 government win or lose the case. The government always wins  
8 when justice is done, regardless of whether the verdict is  
9 guilty or not guilty.

10 Nature of evidence. Testimony and exhibits. As I  
11 stated earlier, your duty is to determine the facts based on  
12 the evidence that has been admitted in this case. The term  
13 evidence includes the sworn testimony of witnesses, both on  
14 direct examination and cross-examination, and the exhibits  
15 received into evidence regardless of who may have produced  
16 them.

17 Regarding the first form of evidence, that is sworn  
18 testimony, arguments and statements of attorneys, questions  
19 to witnesses, and material excluded by my rulings, are not  
20 evidence. For example, at times during the trial, a lawyer  
21 on cross-examination may have incorporated into a question a  
22 statement that assumed certain facts to be true and asked the  
23 witness if the statement was true. If the witness denied the  
24 truth of the statement, and if there is no evidence in the  
25 record providing that the assumed fact is true, then you may

1 not consider the fact to be true simply because it was  
2 contained in a lawyer's question. Similarly, at times during  
3 the trial, I sustained objections to questions and either  
4 prevented a witness from answering or ordered an answer  
5 stricken from the record. You may not draw inferences from  
6 unanswered questions and you may not consider any responses  
7 that I ordered stricken from the record.

8           Regarding the second form of evidence, that is  
9 exhibits, exhibits that have been marked for identification  
10 but not received may not be considered by you as evidence.  
11 Only those exhibits received may be considered as evidence.  
12 You should consider the evidence in the light of your own  
13 common sense and experience and you may draw reasonable  
14 inferences from the evidence. However, you are to base your  
15 verdict only on the evidence received in the case. Anything  
16 you may have seen or heard about this case outside the  
17 courtroom is not evidence and must be entirely disregarded.  
18 Stated right from the beginning, jury selection, everything,  
19 the only thing, and everything you'll need is going to be  
20 received in this courtroom, okay. And that's the only thing  
21 you consider.

22           Direct and circumstantial evidence. As I explained  
23 to you during my preliminary instructions to you at the start  
24 of trial, the law recognizes two types of evidence -- direct  
25 and circumstantial. Now that the trial is over, more

1 elaborate instruction on that subject is appropriate. Direct  
2 evidence is evidence that proves a disputed fact directly.  
3 For example, when a witness testifies to what he or she saw,  
4 heard, or observed, that is called direct evidence.

5 Circumstantial evidence is evidence that tends to  
6 prove a disputed fact by proof of other facts. I will give  
7 you an example other than that snow example that I gave you  
8 during my preliminary instructions. Suppose that when you  
9 came into the courthouse today, the sun was shining and it  
10 was a nice day, but the courtroom blinds were drawn and you  
11 could not look outside. Then later, as you were sitting  
12 here, someone walked in with a dripping, wet umbrella and  
13 soon after, somebody else walked in with a dripping wet  
14 raincoat. Now, on our assumed facts, you cannot look outside  
15 the courtroom and you cannot see whether it's raining so you  
16 have no direct evidence of that fact, but on the combination  
17 of the facts about the umbrella, and the raincoat, it would  
18 be reasonable for you to infer that it had begun to rain  
19 based on that circumstantial evidence that you observed.

20 That is all there is to circumstantial evidence.  
21 Using your reason and experience, you infer from established  
22 facts the existence or the nonexistence of some other fact.  
23 Please note, however, that it is not a matter of speculation  
24 or guess. It is a matter of logical inference.

25 The law makes no distinction between direct and

1 circumstantial evidence. Circumstantial evidence is of no  
2 less value than direct evidence, and you may consider either  
3 or both and you may give them such weight as you conclude is  
4 warranted. And I emphasize, as I've said in my instructions,  
5 common sense. It's critical and important in your evaluation  
6 of evidence.

7 The indictment is not evidence. As I explained to  
8 you during my preliminary instructions, the defendant has  
9 been charged with a crime about which I will further instruct  
10 you shortly. The instrument through which he has been  
11 charged is called the indictment. The indictment is not  
12 evidence. Rather, it is merely an accusation describing the  
13 charge made against the defendant. As a result, it may not  
14 be considered by you as any evidence of guilt of the  
15 defendant.

16 Potential punishment is not evidence. Similarly,  
17 the question of possible punishment of the defendant should  
18 be of no concern to you and should not in any sense enter  
19 into or influence your deliberations. The duty of imposing  
20 sentence rests exclusively upon the court. Your function is  
21 to weigh the evidence in the case and to determine whether or  
22 not the defendant is guilty beyond a reasonable doubt solely  
23 upon the basis of such evidence. Under your oath as jurors,  
24 you cannot allow consideration of the punishment which may be  
25 imposed upon the defendant if he is convicted to influence



1 your verdict in any way or in any sense let it enter into  
2 your deliberations. Okay. Strictly prohibited.

3 Evaluation of evidence. Verdict based on  
4 evidence, not sympathy. Under your oath as jurors, you are  
5 not to be swayed by sympathy. You are to be guided by the  
6 evidence in this case. The crucial hard core question that  
7 you must ask yourself as you sift through the evidence is  
8 this. Has the government proven the guilt of the defendant  
9 beyond a reasonable doubt.

10 It is for you alone to decide whether the  
11 government has proven that the defendant is guilty of the  
12 crime charged solely on the basis of the evidence and subject  
13 to the law as I charge you. It must be clear to you that  
14 once you let fear or prejudice or bias or sympathy interfere  
15 with your thinking, there is a risk that you will not arrive  
16 at a true and just verdict.

17 If you have a reasonable doubt as to the guilt  
18 of the defendant, then you should not hesitate for any reason  
19 to render a verdict of not guilty. But on the other hand, if  
20 you should find that the government has met its burden of  
21 proving the guilt of the defendant beyond a reasonable doubt,  
22 then you should not hesitate because of sympathy or any other  
23 reason to render a verdict of guilty.

24 Improper considerations. Race, religion,  
25 national origin, sex, or age. Your verdict must be based

1 solely upon the evidence developed at trial or the lack of  
2 evidence.

3 It would be improper for you to consider in  
4 reaching your decision as to whether the government sustained  
5 its burden of proof any personal feelings you may have about  
6 the defendant's race, religion, national origin, sex, or age.  
7 All persons are entitled to the presumption of innocence and  
8 the government has the burden of proof as I will discuss in a  
9 moment.

10 It would be equally improper for you to allow  
11 any feelings you might have about the nature of the crime  
12 charged to interfere with your decision-making process. To  
13 repeat, your verdict must be based exclusively upon the  
14 evidence or the lack of evidence in the case.

15 Quality, not quantity of evidence. The fact  
16 that one party has introduced more evidence than the other  
17 does not mean that you should find the facts in favor of the  
18 side offering the more evidence. It is the quality of the  
19 evidence that governs, not the quantity. As a matter of  
20 fact, the defendant in a criminal case is under no obligation  
21 to present any evidence.

22 Credibility of witnesses. You have heard  
23 the -- you have had the opportunity, excuse me, to observe  
24 all of the witnesses. It is now your job to decide how  
25 believable each witness was in his or her testimony. You are

1 the sole judges of the credibility of each witness and of the  
2 importance of his or her testimony.

3 In evaluating a witness' testimony, you should  
4 use all the tests for truthfulness that you would use in  
5 determining matters of importance to you in your everyday  
6 life. You should consider any bias or hostility the witness  
7 may have shown for or against any party, as well as the  
8 interest, excuse me, as well as the interest the witness may  
9 have in the outcome of the case. You should consider the  
10 following: First, the opportunity the witness had to see,  
11 hear, and know the things about which he or she testified;  
12 two, the accuracy of the witness' memory; three, his or her  
13 candor or lack of candor; four, the reasonableness and  
14 possibility -- probability, excuse me, of the witness'  
15 testimony; and five, the testimony's consistency or lack of  
16 consistency; and six, its corroboration or lack of  
17 corroboration with other credible testimony.

18 In other words, what you must try to do in  
19 deciding credibility is to size up the witness in the light  
20 of his or her demeanor, the explanations given, and all the  
21 other evidence in the case. Always remember that you should  
22 use your common sense, your good judgment, and your own life  
23 experience.

24 The existence or nonexistence of a fact is not  
25 determined by the number of witnesses called. Again, your

1 concern is not the quantity, but the quality of the evidence.

2 Testimony of law enforcement witnesses. You  
3 have heard the testimony of law enforcement officials. The  
4 fact that a witness may be employed by the government as a  
5 law enforcement official does not mean that his or her  
6 testimony is necessarily deserving of any more or any less  
7 consideration or greater or lesser weight than that of an  
8 ordinary witness.

9 At the same time, it is legitimate for defense  
10 counsel to try to attack the credibility of law enforcement  
11 witnesses on the grounds that his or her testimony may be  
12 colored by personal or professional interest in the outcome  
13 of the case.

14 It is your decision, after reviewing all the  
15 evidence, whether to accept the testimony of law enforcement  
16 witnesses and to give that testimony whatever weight, if any,  
17 you find it deserves.

18 Pretrial statements of the defendant. There  
19 has been evidence that the defendant made certain statements  
20 to, or overheard by, law enforcement authorities.

21 Evidence of these statements was properly  
22 admitted in this case and may be properly considered by you.  
23 You are to give the evidence of such statements such weight  
24 as you feel it deserves in light of all of the evidence.

25 Whether you approve or disapprove of the use

1 of these statements, the use of these statements may not  
2 enter your deliberations. Let me reread that so it's clear.  
3 Whether you approve or disapprove of the use of these  
4 statements may not enter your deliberations. I instruct you  
5 that the defendant's rights were not violated during the  
6 making of these statements and the government's use of this  
7 evidence is entirely lawful.

8 Testimony of the defendant. In a criminal  
9 case, the defendant cannot be required to testify but if he  
10 does choose to testify, he is of course permitted to take the  
11 witness stand on his own behalf. In this case defendant  
12 decided to testify. You should examine and evaluate his  
13 testimony just as you would the testimony of any witness with  
14 an interest in the outcome of the case.

15 Use of evidence obtained. During the trial,  
16 you have heard testimony about evidence obtained by law  
17 enforcement officers through searches. You are instructed  
18 that the evidence obtained from these searches was properly  
19 admitted into this case, and may be properly considered by  
20 you. Such searches were entirely appropriate law enforcement  
21 actions. Whether you approve or disapprove of how the  
22 evidence was obtained should not enter into your  
23 deliberations, because I instruct you that the government's  
24 use of the evidence is entirely lawful.

25 In addition, the government has offered

1 evidence in the form of a recording of a telephone call  
2 between the defendant and other people. You are instructed  
3 that this recording was lawfully obtained and the government  
4 is entitled to use the recording in this case.

5 You must, therefore, regardless of your  
6 personal opinions, give this evidence full consideration  
7 along with all the evidence in the case in determining  
8 whether the government has proven the defendant's guilt  
9 beyond a reasonable doubt.

10 Expert testimony. You have also heard  
11 testimony from what we call an expert witness. An expert is  
12 allowed to express his opinion on those matters about which  
13 he has special knowledge and training. Expert testimony is  
14 presented to you on the theory that someone who is  
15 experienced in the field can assist you in understanding the  
16 evidence or in reaching an independent decision on the facts.

17 In weighing the expert's testimony, you may  
18 consider the expert's qualifications, his opinions, his  
19 reasons for testifying as well as all the other  
20 considerations that ordinarily apply when you're deciding  
21 whether or not to believe a witness -- a witness' testimony.  
22 You may give the expert testimony whatever weight, if any,  
23 you find it deserves in light of all the evidence in this  
24 case. You should not, however, accept this testimony merely  
25 because he is an expert. Nor should you substitute it for

1 your own reason, judgment, and common sense. The  
2 determination of facts in this case rests solely with you.

3 Transcript of audio recording. With regard to  
4 the audio recording that I mentioned earlier, a certain  
5 typewritten transcript was provided to you. This transcript,  
6 which purports to identify the speakers engaged in an oral  
7 conversation was provided to you for the limited and  
8 secondary purpose of aiding you in following the content of  
9 the conversation, as you listened to the audio recording and  
10 aiding you in identifying the speakers.

11 However, you are specifically instructed that  
12 whether the transcript correctly or incorrectly reflect the  
13 content of the conversation or the identity of the speakers  
14 is entirely for you to determine based upon your own  
15 evaluation of testimony you have heard concerning the  
16 preparation of the transcript, and from your own examination  
17 of the transcript in relation to your hearing of the audio  
18 recording itself. If you noticed a difference between what  
19 you heard on the recording and what you read in the  
20 transcript, you must rely on what you heard, not what you  
21 read. Similarly, if you could not hear or understand certain  
22 parts of the recording, you must ignore the transcript as far  
23 as that part, as far as those parts are concerned.

24 Particular investigative techniques not  
25 required. In the questions and arguments of defense counsel

1 in this case, you have heard reference to the fact that  
2 certain investigative techniques may not have been used by  
3 law enforcement authorities. However, there is no legal  
4 requirement the government prove its case through any  
5 particular means. Law enforcement authorities have no legal  
6 duty to employ in the course of an investigation all of the  
7 many tools at their disposal, and the failure to use any  
8 particular technique or techniques does not tend to show that  
9 a defendant is not guilty of a crime with which he is  
10 charged. Thus, you are not to concern yourself with why law  
11 enforcement authorities used the techniques they did, or why  
12 they did not use other techniques. Rather, your concern is  
13 to determine whether or not, based on the evidence or lack of  
14 evidence, the guilt of the defendant has been proven beyond a  
15 reasonable doubt.

16 Variance in dates immaterial. Please note  
17 that it does not matter if the indictment charges that a  
18 specific act occurred on or about a certain date and that the  
19 evidence indicates that, in fact, it was on another date.  
20 The law requires only a substantial similarity between the  
21 dates alleged in the indictment and the date established by  
22 testimony or exhibits.

23 Okay, let's talk about the burden of proof.  
24 Now, before discussing the alleged crime charged here, I want  
25 to remind you that the indictment here is a mere accusation.



1 It is not evidence and you are to draw no inference of guilt  
2 from the mere fact the defendant has been charged. As a  
3 result, in reaching your determination of whether the  
4 government has proved the defendant guilty beyond a  
5 reasonable doubt, you may consider only the evidence  
6 introduced or the lack of evidence.

7 The defendant has no burden of proof  
8 whatsoever in this case. He is under no obligation to  
9 produce any witnesses. He is presumed to be innocent and the  
10 presumption of innocence continues through the trial and  
11 during your deliberations. The presumption of innocence is  
12 overcome when and only when the government establishes the  
13 guilt of the defendant by proving each element of the offense  
14 you are considering beyond a reasonable doubt.

15 Now what do I mean by beyond a reasonable  
16 doubt? It is not some vague or speculative doubt. As the  
17 phrase implies, a reasonable doubt is a doubt that is based  
18 upon reason, a reason that appears in the evidence or the  
19 lack of evidence. The government is not required to prove a  
20 defendant guilty beyond every conceivable or every possible  
21 doubt. Nor is the government required to prove a defendant  
22 guilty to an absolute mathematical certainty, because of  
23 course in human affairs, that is usually impossible. But you  
24 should review all the evidence as you remember it, sift out  
25 what you believe, discuss it, analyze it, compare your views

1 of the evidence with that of your fellow jurors, and if that  
2 process produces in your mind some belief or conviction that  
3 you would be willing to accept without further hesitation,  
4 then you may say that you have been convinced beyond a  
5 reasonable doubt.

6 On the other hand, if going through that same  
7 process in your mind, your mind is wavering, or it is so  
8 uncertain that you would hesitate before acting if it were an  
9 important matter of your own, then you have not been  
10 convinced beyond a reasonable doubt.

11 We're now going to go into the substantive  
12 law. The indictment in this case contains two counts. Each  
13 count is a separate offense or crime. Each count must  
14 therefore be considered separately by you, and must -- and  
15 you must return a separate verdict on each count.

16 Count 1 of the indictment charges defendant in  
17 this case with transportation of child pornography, in  
18 violation of Title 18, United States Code, Sections  
19 2252A(a)(1), and 2256(8)(A). Specifically, Count 1 of the  
20 indictment reads as follows: "On or about May 24th, 2009, in  
21 the Northern District of New York, Joseph Jenkins, the  
22 defendant herein, did knowingly and unlawfully transport  
23 child pornography using a means and facility of interstate  
24 and foreign commerce and in and affecting interstate and  
25 foreign commerce by any means, including by computer, in that

1 the defendant made entry into Canada at the Port of Lansdowne  
2 Ontario, from Wellesley Island, New York, in Jefferson  
3 County, transporting in a vehicle a Toshiba laptop computer,  
4 serial number 78175808W, that contained one or more graphic  
5 image files and multimedia files containing images of a minor  
6 and minors engaged in sexually explicit conduct."

7 Count 2 of the indictment charges the  
8 defendant in this case with the possession of child  
9 pornography in violation of Title 18, United States Code,  
10 Sections 2252A(a)(5)(B) and 2256(8)(A). Specifically, Count  
11 2 of the indictment reads as follows: "On or about May 24th,  
12 2009, in the Northern District of New York, Joseph Jenkins,  
13 the defendant herein, did knowingly possess material that  
14 contained one or more images of child pornography, that had  
15 been transported using a means and facility of interstate and  
16 foreign commerce, and in and affecting such commerce by any  
17 means, including by computer, and that was produced using  
18 materials that had been shipped and transported in and  
19 affecting such commerce by any means, including by computer,  
20 that is: A PNY Attache 8GB -- 8-gigabyte USB thumb drive  
21 that contained one or more graphic image files and multimedia  
22 files containing images of a minor and minors engaged in  
23 sexually explicit conduct; and two, a PNY Attache 4GB thumb  
24 drive that contained one or more graphic image files and  
25 multimedia files containing images of a minor and minors

1 engaged in sexually explicit conduct obtained by use of the  
2 internet."

3 Having read the two counts of the indictment  
4 to you, I will now discuss in more detail the elements of  
5 those two counts which the government must prove beyond a  
6 reasonable doubt.

7 Count 1. Transportation of child pornography.  
8 Title 18, United States Code, Section 2252A and then  
9 subdivision (a)(1) provides as follows: "Any person who...  
10 knowingly mails, or transports or ships using any means or  
11 facility of interstate or foreign commerce or in or affecting  
12 interstate or foreign commerce by any means, including by  
13 computer, any child pornography ... [shall be guilty of a  
14 crime]."

15 As a result, in order to satisfy its burden of  
16 proof with regard to Count 1, the government must establish  
17 each of the following four elements beyond a reasonable  
18 doubt:

19 One, that the defendant knowingly transported  
20 a visual depiction as that term will be defined;

21 Two, that the visual depiction was transported  
22 using any means or facility of interstate or foreign commerce  
23 or in or affecting interstate or foreign commerce by any  
24 means, including by computer;

25 Three, that the visual depiction was child

1     pornography, as that term will be defined; and

2             Four, that the defendant knew of the sexually  
3     explicit nature of the material and that the visual depiction  
4     was of an actual minor engaged in that sexually explicit  
5     conduct.

6             Having briefly described these four elements,  
7     I will now discuss them with you in more detail.

8             First element. The first element that the  
9     government must prove beyond a reasonable doubt is that the  
10    defendant knowingly transported a visual depiction.

11            A visual depiction includes any photograph,  
12    film, video, or picture, including undeveloped film and  
13    videotape, and data stored on a computer disk or by  
14    electronic means which is capable of conversion into a visual  
15    image.

16            An act is done knowingly when it is done  
17    voluntarily and intentionally, not because of accident,  
18    mistake, or other innocent reason. It is not necessary for  
19    the government to show the defendant personally transported  
20    or shipped the depiction. It is sufficient if the government  
21    proves that the defendant knowingly caused the interstate  
22    shipment to take place.

23            Second, the second element that the government  
24    must prove beyond a reasonable doubt is that the visual  
25    depiction was transported using any means or facility of

1 interstate or foreign commerce or in or affecting interstate  
2 or foreign commerce by any means, including by computer.  
3 This means that the government may establish this element by  
4 proving that the visual depiction crossed between one state  
5 and another or between the United States and a foreign  
6 country.

7 Third. The third element the government must  
8 prove beyond a reasonable doubt is that the visual depiction  
9 was child pornography.

10 Child pornography means any visual depiction  
11 the production of which involved the use of a minor engaging  
12 in sexually explicit conduct, as I will explain that term to  
13 you, and which portrays that minor engaged in that conduct.

14 The visual depiction must be of a real person  
15 under the age of 18 engaging in sexually explicit conduct.  
16 The government does not have to prove the identity of the  
17 minor, or the exact age of the minor. You may consider all  
18 the evidence, including your viewing of the depiction, in  
19 determining whether the depiction portrayed an actual person  
20 under the age of 18 engaging in sexually explicit conduct.

21 The term sexually explicit conduct means any  
22 actual or simulated sexual intercourse, including genital to  
23 genital, oral to genital, anal to genital, or oral to anal,  
24 whether between persons of the same or opposite sex;  
25 bestiality, masturbation, sadistic or masochistic abuse; or

1 lascivious exhibition of the genitals or pubic area of any  
2 person.

3 The term lascivious exhibition means a  
4 depiction that displays or brings to view to attract notice  
5 to the genitals or the pubic area of children in order to  
6 excite lustfulness or sexual stimulation in the viewer. Not  
7 every exposure of the genitals or the pubic area constitutes  
8 a lascivious exhibition. In deciding whether the government  
9 has proved a visual depiction constitutes a lascivious  
10 exhibition, you must consider the following questions:

11 One, whether the focal point of the visual  
12 depiction is on the child's genitals or pubic area, or  
13 whether there is some other focal area;

14 Two, whether the setting of the visual  
15 depiction makes it appear to be sexually suggestive, for  
16 example, in a place or pose generally associated with sexual  
17 activity;

18 Three, whether the child is displayed in an  
19 unnatural pose or in inappropriate attire considering the age  
20 of the child;

21 Four, whether the child is fully or partially  
22 clothed or nude, although nudity is not in and of itself  
23 lascivious;

24 Five, whether the visual depiction suggests  
25 sexual coyness or a willingness to engage in sexual activity;

1                   And six, whether the visual depiction is  
2                   intended or designed to elicit a sexual response in the  
3                   viewer.

4                   It is not required that a particular visual  
5                   depiction involve all of these factors to be a lascivious  
6                   exhibition. The importance you give to any one of the  
7                   factors is up to you to decide.

8                   The fourth element. The fourth element that  
9                   the government must prove beyond a reasonable doubt is the  
10                  defendant knew that the material he possessed was child  
11                  pornography.

12                  As I stated before, an act is done knowingly  
13                  when it is done voluntarily and intentionally and not because  
14                  of accident, mistake, or for some other reason.

15                  In this case, the term knowingly refers to an  
16                  awareness of the sexually explicit nature of the material and  
17                  to the knowledge that the visual depictions were in fact of  
18                  actual minors engaged in that sexually explicit conduct.

19                  The government must show the defendant had  
20                  knowledge of the general nature of the contents of the  
21                  material. The defendant need not have any specific knowledge  
22                  as to the identity or actual age of the underage performer.  
23                  The defendant must have knowledge or awareness that the  
24                  material contained a visual depiction of a minor engaging in  
25                  sexually explicit conduct. Such knowledge may be shown by



1 direct or circumstantial evidence, or both. Eyewitness  
2 testimony of defendant's viewing of the material is not  
3 necessary to prove his awareness of its contents. The  
4 circumstances may warrant an inference that he was aware of  
5 what the material depicts. Furthermore, the defendant's  
6 belief as to the legality or illegality of the material is  
7 irrelevant.

8 Finally, a few additional words are  
9 appropriate regarding consciousness of guilt from flight.  
10 You have heard evidence that the defendant fled after he  
11 learned that he was going to be prosecuted in Canada for the  
12 same conduct giving rise to the charges for which he is now  
13 on trial. If proved, the flight of defendant after he knows  
14 he has been accused of a crime may tend to prove that the  
15 defendant believed that he was guilty. It may be weighed by  
16 you in this connection together with all the other evidence.

17 However, flight may not always reflect  
18 feelings of guilt. Moreover, feelings of guilt, which are  
19 present -- which are present in many innocent people, do not  
20 necessarily reflect actual guilt.

21 You are specifically cautioned that evidence  
22 of flight of a defendant may not be used by you as a  
23 substitute of proof of guilt. Flight does not create a  
24 presumption of guilt.

25 Whether or not evidence of flight does show

1 the defendant believed that he was guilty and the  
2 significance, if any, to be given to defendant's feelings on  
3 this matter are for you to determine. Okay. You are the  
4 judges of the facts, it's always your determination that  
5 controls.

6 Count 2. Possession of child pornography.  
7 Excuse me a second. Title 18, United States Code, Section  
8 2252A(a)(5)(B) provides as follows, in pertinent part: "Any  
9 person who...knowingly possesses,...any book, magazine,  
10 periodical, film, videotape, computer disk, or any other  
11 material that contains an image of child pornography that has  
12 been mailed, or shipped or transported using any means or  
13 facility of interstate or foreign commerce or in or affecting  
14 interstate or foreign commerce by any means, including by  
15 computer, or that was produced using materials that had been  
16 mailed, or shipped or transported in or affecting interstate  
17 or foreign commerce by any means, including by  
18 computer...[shall be guilty of a crime]."

19 As a result, in order to satisfy its burden of  
20 proof with regard to Count 2, the government must establish  
21 each of the following four elements beyond a reasonable  
22 doubt:

23 First, that the defendant knowingly possessed  
24 a visual depiction as I have defined that term.

25 Two, that the visual depiction has been

1 transported using any means or facility of interstate or  
2 foreign commerce or in or affecting interstate or foreign  
3 commerce by any means including by computer or that the  
4 visual depiction was produced using materials that had been  
5 shipped or transported in or affecting interstate or foreign  
6 commerce by any means, including by computer;

7 And that the visual depiction was child  
8 pornography, as I have defined that term; and

9 Four, that the defendant knew of the sexually  
10 explicit nature of the material and that the visual depiction  
11 was of an actual minor engaged in that sexually explicit  
12 conduct.

13 Having briefly described these four elements,  
14 I will now discuss them in more detail.

15 First, the first element that the government  
16 must prove beyond a reasonable doubt is that the defendant  
17 knowingly possessed a visual depiction. As I previously  
18 instructed you, a visual depiction includes any photograph,  
19 film, video, or picture, including undeveloped film and  
20 videotape, data stored on a computer disk or by electronic  
21 means which is capable of conversion into a visual image.

22 To possess something means to have it within a  
23 person's control. That does not necessarily mean that the  
24 person must hold it physically, that it is -- that is, have  
25 actual possession of it. As long as the visual depiction is

1 within the defendant's control, he possesses it. If you find  
2 the defendant either had actual possession of the depiction  
3 or that he had the power and the intention to exercise  
4 control over it, even though it was not in his physical  
5 possession, you may find that the government has proven  
6 possession.

7 The law also recognizes that possession may be  
8 sole or joint. If one person alone possesses it, that is  
9 sole possession. However, it is possible that more than one  
10 person may have the power and intention to exercise control  
11 over the visual depiction. This is called joint possession.  
12 If you find the defendant had such power and intention, then  
13 he possessed the depiction even if he possessed it jointly  
14 with another person.

15 The government must prove that the defendant  
16 possessed the depiction knowingly. An act is done knowingly  
17 when it is done voluntarily and intentionally, and not  
18 because of accident, mistake, or for some other innocent  
19 reason.

20 Second element. Please note that the second  
21 element of Count 2 is different from the second element of  
22 Count 1 in that it contains the additional language "or that  
23 the visual depiction had been produced using materials that  
24 had been shipped or transported in or affecting interstate or  
25 foreign commerce by any means, including by computer."

1           This means that instead of establishing this  
2           element by proving beyond a reasonable doubt that the visual  
3           depiction had been transported using any means or facility of  
4           interstate or foreign commerce or in or affecting interstate  
5           or foreign commerce by any means, the government may also  
6           establish this element by proving, beyond a reasonable doubt,  
7           that the visual depiction had been produced using materials  
8           that had been shipped or transported in or affecting  
9           interstate or foreign commerce by any means.

10           Third and fourth elements. I have previously  
11           instructed you on the third and fourth elements. Please rely  
12           on my instructions concerning those elements with regard to  
13           this count as well, they are the same.

14           Before I proceed to a discussion of the venue  
15           requirement, I'd like to add a few words about the knowledge  
16           requirement contained in the first and fourth elements of  
17           Count 1, and the first and fourth elements of Count 2. In  
18           determining whether defendant acted knowingly, you may  
19           consider whether defendant deliberately closed his eyes to  
20           what would otherwise have been obvious to him. If you find  
21           beyond a reasonable doubt that defendant acted with or that  
22           his ignorance was solely and entirely the result of a  
23           conscious purpose to avoid learning the truth of the facts  
24           referenced in those elements, then this knowledge requirement  
25           may be satisfied. However, guilty knowledge may not be

1 established by demonstrating that the defendant was merely  
2 negligent, foolish, or mistaken. It is entirely up to you  
3 whether you find the defendant deliberately closed his eyes  
4 and any inferences to be drawn from the evidence on that  
5 issue. Okay.

6 Venue requirement for both counts. In  
7 addition to the elements of Count 1 and 2, you must consider  
8 whether any act in furtherance of the crime occurred within  
9 the Northern District of New York. You are instructed that  
10 the Northern District of New York includes, among other  
11 places, Syracuse, Binghamton, Oswego, Watertown, Plattsburgh,  
12 Albany, Utica, New York. It also includes the counties and  
13 land running along the St. Lawrence River including the  
14 Jeffer -- including Jefferson County. In this regard, the  
15 government need not prove that the crime itself was committed  
16 in this district or that defendant himself was present here.  
17 It is sufficient to satisfy this element if any act in  
18 furtherance of the crime occurred within this district.  
19 Okay. And I told you right from the beginning of jury  
20 selection when I welcomed you to District Court in the  
21 Northern District of New York, Northern District is a huge  
22 area, 32 of the 62 counties of the state. I've given you a  
23 brief description of the geographical area, runs along the  
24 U.S.-Canadian border, over to Albany, Utica, down to  
25 Binghamton, so that's what you need to decide to satisfy this

1 element if any act in furtherance of the crime occurred  
2 within this district.

3 I should note that on this issue, the  
4 government need not prove venue beyond a reasonable doubt,  
5 but only by a preponderance of the evidence, which is a lower  
6 standard than proof beyond a reasonable doubt. A  
7 preponderance of the evidence means that the government must  
8 prove that it is more likely than not that any act in  
9 furtherance of the charge you are considering occurred in the  
10 Northern District of New York. Thus, with respect to  
11 Counts 1 and 2, the government has satisfied its venue  
12 obligation if you conclude that it is more likely than not  
13 that any act in furtherance of the conduct charged occurred  
14 within this district. The Northern District of New York.

15 If you find that the government has failed to  
16 prove that any act in furtherance of the crime, excuse me,  
17 occurred within this district, then you must acquit the  
18 defendant of the charge.

19 Finally, please note that depending on the  
20 verdict you reach, there may be a brief additional proceeding  
21 after you have returned with your verdict.

22 In conclusion, I have now outlined the rules  
23 of law applicable to this case and the process by which you  
24 should weigh the evidence and determine the facts. In a few  
25 minutes you will retire to the jury room for your

1 deliberations. Your first order of business in the jury room  
2 will be to elect a foreperson. The foreperson's  
3 responsibility is to ensure that deliberations proceed in an  
4 orderly manner. This does not mean that the foreperson's  
5 vote is entitled to any greater weight than the vote of any  
6 other juror.

7           When you are in the jury room, listen to each  
8 other and discuss the evidence and issues. You will have at  
9 your disposal all of the exhibits. It is the duty of each of  
10 you as jurors to consult with each other. You must  
11 deliberate with a view to reaching an agreement but only if  
12 you can do so without violating your individual judgment and  
13 conscience. Your job as jurors is to reach a fair conclusion  
14 from the law and the evidence. The defendant, the  
15 government, and the court are relying on you to give full and  
16 conscientious consideration to the issues and the evidence  
17 before you.

18           In order to return a verdict, it is necessary  
19 that each juror agree. Your verdict must be unanimous.

20           As you know, I have permitted you to take  
21 notes during the trial. As I explained during my preliminary  
22 instructions to you, those notes are simply an aid to your  
23 memory. Because the notes may be inaccurate or incomplete,  
24 they may not be given any greater weight or influence than  
25 the recollections of other jurors about the facts or the



1 conclusions drawn from the facts in determining the outcome  
2 of this case. You may base your determination of the facts  
3 and ultimately your verdict on the court record, rather than  
4 on any juror's notes.

5 Having said that, if in the course of your  
6 deliberations, your recollection of any part of the testimony  
7 should fail, or if you find yourself in doubt concerning my  
8 instructions, it is your privilege to return to the courtroom  
9 to have the testimony read to you or my instructions further  
10 explained. Please remember that it is not always easy to  
11 locate what portion of the testimony you might want, so be as  
12 specific as you possibly can in requesting the portion or  
13 portions of testimony that you may want. In addition, I  
14 caution you that the reading back of testimony may take some  
15 time and effort. You should therefore make a conscientious  
16 effort to resolve any questions as to the testimony through  
17 your collective recollections in your deliberation process.  
18 Talk to each other, discuss.

19 Should you desire to communicate with the  
20 court during your deliberations, please put your message or  
21 question in writing. The foreperson should sign the note and  
22 pass it to the marshal who will bring it to my attention. I  
23 will then respond either in writing or orally by having you  
24 returned to the courtroom. However, do not tell me or anyone  
25 else how the jury stands on the issue of the defendant's

1     guilt until after a unanimous verdict is reached. In other  
2     words, no indication of where you are or if there's been a  
3     vote taken or anything like that. Don't want to know  
4     anything about that. All we need to know is what your  
5     question is and put it in writing and it doesn't have to be  
6     the foreperson, if the foreperson's writing is not great,  
7     whoever has the best writing so we can make sure we can read  
8     it. The foreperson is required to sign it, put the date on  
9     it, time, and send it out.

10                 During your deliberations, do not hesitate to  
11     reexamine your views and change your mind. Do not, however,  
12     surrender your honest convictions because of the opinion of a  
13     fellow juror or for the purpose of returning a verdict.  
14     Remember, you are not partisans. You are the judges. Judges  
15     of the facts. Your duty is to seek the truth from the  
16     evidence presented to you while holding the government to its  
17     burden of proof.

18                 Once you have reached a unanimous verdict,  
19     your foreperson should fill in the verdict form, date it and  
20     sign it and inform the Marshal that a verdict has been  
21     reached.

22                 A verdict form has been prepared for you and I  
23     will now review it with you. One page, very simple,  
24     straightforward. It's got the caption of the case, says  
25     verdict form. First question, as to Count 1, transportation

1 of child pornography, how do you unanimously find the  
2 defendant, guilty or not guilty?

3 Number 2, as to Count 2, possession of child  
4 pornography, how do you unanimously find the defendant,  
5 guilty or not guilty?

6 And then just foreperson, please sign in the  
7 space provided below and notify the marshal that you have  
8 reached a verdict. It has a place for you, foreperson to  
9 sign and for it to be dated. And that completes my  
10 instructions.

11 Are there any questions from anybody? And  
12 again, I remind you, we'll send this all in to you so you can  
13 have it as reference material. Not telling you you have to  
14 reread it but it's there if you need it. Okay. Lori, can  
15 you swear in the marshals, please. We need two. Actually  
16 three, right? Our alternates, you will be taken back  
17 upstairs to the jury assembly room and you'll be kept there  
18 unless and until we need you at some point in the  
19 deliberations, and you'll be kept apprised of what's going  
20 on, if there are notes and those sort of things, be brought  
21 back to the courtroom at some point if we need you or when  
22 there's a verdict. Okay.

23 COURT SECURITY OFFICER: He'll be here momentarily.

24 THE COURT: Welcome back. State your name for the  
25 record.

1 COURT SECURITY OFFICER: John Conroy.

2 COURT SECURITY OFFICER: John Estabrook.

3 (The court security officers were duly sworn.)

4 THE COURT: Okay. Ladies and gentlemen, you may  
5 retire to deliberate, alternates will be taken to the jury  
6 assembly room, and the evidence, all the admitted evidence is  
7 available for you and will be brought in to you, okay. Go  
8 ahead.

9 (Jury excused for deliberations, 11:39 a.m.)

10 THE COURT: Okay. We're in the courtroom without  
11 the jury. Are there any requests or objections with regard  
12 to the court's charge, from the government?

13 MS. THOMSON: No, your Honor.

14 MR. GOLDSMITH: I did want to clarify, I don't  
15 think the transcript was admitted, was it, of the phone call?

16 MS. CARROLL: It wasn't.

17 MS. THOMSON: It wasn't admitted but it was shown.

18 MR. GOLDSMITH: I just say that as a matter of  
19 clarity, it's not an objection to it because I don't think it  
20 bears any weight and the court was careful in its instruction  
21 that the jury's recollection of the phone call itself  
22 controls.

23 THE COURT: That instruction is given because the  
24 visual aid that was provided by the government when they were  
25 listening to the tape recording, there was a video, video

1 transcript displayed on the screen, which had the photo of  
2 the defendant and a blank for the other person and went back  
3 and forth so it's important for them to understand that that  
4 does not control, it's their impression and hearing of the  
5 video, or of the audio recording, excuse me, the audio  
6 recording that controls, and that was the purpose of that  
7 instruction. Anything else?

8 MR. GOLDSMITH: Nothing. Just housekeeping, do  
9 you -- I'm assuming you permit them to deliberate during  
10 lunch?

11 THE COURT: Yeah, their lunch is brought to them,  
12 they've already ordered their lunch, it will be brought, if  
13 it's not there already, it will be there shortly, and they  
14 continue to deliberate, eat their lunch, it's up to them to  
15 decide if they want to break or keep deliberating while  
16 they're eating. So that's the way we handle that.

17 If you're going to be out of the courtroom, away  
18 from this floor, I'm going to ask you to leave a cell number  
19 with my courtroom deputy, Lori, so we can get you if there  
20 are any notes so we can get everybody back assembled here in  
21 the courtroom as quickly as possible to address any notes  
22 that are sent from the jury. Okay.

23 Other than that, the court thanks you for your  
24 courtesies and the way you tried the case, I think we moved  
25 through it expeditiously and appreciate the courtesies of

1 counsel.

2 MS. CARROLL: Your Honor, there's really only one  
3 other matter for the record and that is the defendant is  
4 going to make an initial appearance on the perjury complaint  
5 in five minutes in front of Magistrate Dancks.

6 THE COURT: Yeah, that shouldn't interfere in any  
7 way. If we get a note, we'll wait for him, that's not an  
8 issue.

9 MS. CARROLL: Okay.

10 THE COURT: Thank you.

11 THE CLERK: Court's in recess.

12 (Court in recess for jury deliberations,  
13 11:42 a.m. to 1:30 p.m.)

14 (Open Court, Jury Out, 1:30 p.m.)

15 THE COURT: Okay, we're in the courtroom without  
16 the jury. The jury sent out a note that they have a verdict  
17 so we're going to bring the jury in, we're going to take the  
18 verdict, and then once we've taken the verdict, we'll go  
19 right into the next phase, if necessary. Okay.

20 MR. GOLDSMITH: Okay.

21 (Jury Present, 1:31 p.m.)

22 THE COURT: The record should reflect that we have  
23 the ladies and gentlemen of the jury, defendant and defense  
24 counsel and government attorneys. It is the court's  
25 understanding that a verdict has been reached. I'm going to

1 ask the foreperson to please stand and my courtroom deputy  
2 will take that verdict.

3 THE CLERK: In the case of the United States of  
4 America versus Joseph Vincent Jenkins, case number  
5 5:11-CR-602, question 1 as to Count 1, transportation of  
6 child pornography, how do you unanimously find the defendant?

7 THE FOREPERSON: Guilty.

8 THE CLERK: Number 2, as to Count 2, possession of  
9 child pornography, how do you unanimously find the defendant?

10 THE FOREPERSON: Guilty.

11 THE CLERK: Thank you.

12 THE COURT: Okay. Would either party like this  
13 jury polled?

14 MR. GOLDSMITH: Defense requests a polling, your  
15 Honor.

16 THE COURT: Very well. We'll do that.

17 THE CLERK: Now I'm going to ask each of you  
18 individually if the verdict as I just received from the  
19 foreperson is your individual verdict. With regard to the  
20 guilty verdict on Counts 1 and 2 of the indictment, Juror  
21 Number 1, is that your verdict?

22 JUROR NO. 1: Yes.

23 THE CLERK: Juror Number 2?

24 JUROR NO. 2: Yes.

25 THE CLERK: Juror Number 3?

1 JUROR NO. 3: Yes.

2 THE CLERK: Juror Number 4?

3 JUROR NO. 4: Yes.

4 THE CLERK: Juror Number 5?

5 JUROR NO. 5: Yes.

6 THE CLERK: Juror Number 6?

7 JUROR NO. 6: Yes.

8 THE CLERK: Juror Number 7?

9 JUROR NO. 7: Yes.

10 THE CLERK: Juror Number 8?

11 JUROR NO. 8: Yes.

12 THE CLERK: Juror Number 9?

13 JUROR NO. 9: Yes.

14 THE CLERK: Juror Number 10?

15 JUROR NO. 10: Yes.

16 THE CLERK: Juror Number 11?

17 JUROR NO. 11: Yes.

18 THE CLERK: Juror Number 12?

19 JUROR NO. 12: Yes.

20 THE CLERK: Thank you.

21 THE COURT: Okay, ladies and gentlemen. Under  
22 normal circumstances, that would conclude your jury service,  
23 but in this particular case, the government has brought  
24 forfeiture allegations with regards to certain pieces of  
25 property of the defendant. Now you have found the defendant



1 guilty of transportation of child pornography as charged in  
2 Count 1 of the indictment and possession of child pornography  
3 as charged in Count 2 of the indictment. You will now need  
4 to consider a further question regarding property that the  
5 indictment alleges is subject to forfeiture by the defendant  
6 to the government.

7 Forfeiture means the defendant would lose any  
8 ownership or interest he has or claims to have in the  
9 specified property as a part of the penalty for engaging in  
10 criminal activity.

11 After the parties have presented any additional  
12 evidence on this subject, I will instruct you further on the  
13 law with respect to forfeiture. In considering whether the  
14 property is subject to forfeiture, you should consider the  
15 evidence you have already heard and any additional evidence  
16 presented by the parties. You should evaluate that evidence  
17 and its credibility and then I will explain to you, as I did  
18 earlier, some legal instructions. Okay.

19 Ms. Carroll, with regard to the government, does  
20 the government wish to adduce any more evidence with regard  
21 to this forfeiture hearing?

22 MS. CARROLL: Your Honor, as the court knows, it's  
23 the government's position that hearsay is appropriate during  
24 this phase of the trial since this is technically part of the  
25 sentencing proceeding; however, the government will call

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1 Special Agent Willard to provide a synopsis of the evidence  
2 on the forfeiture allegations.

3 THE COURT: Okay. Please come on up. As this is a  
4 separate hearing, Lori, I'm going to ask you to swear him in,  
5 please.

6 THE CLERK: Can you state your full name and spell  
7 it for the record, please.

8 THE WITNESS: Chad Willard, W-i-l-l-a-r-d.

9 THE CLERK: Thank you.  
10

11 C H A D W I L L A R D , recalled as a  
12 witness and being previously duly sworn, testifies  
13 as follows:

14 THE COURT: Go ahead.

15 DIRECT EXAMINATION BY MS. CARROLL:

16 Q Special Agent Willard, were you present in the  
17 courtroom during the testimony of certified forensic examiner  
18 Brian Braisted?

19 A Yes, I was.

20 Q And did you hear the contents of his testimony  
21 regarding his examination of a black Toshiba laptop,  
22 8-gigabyte USB drive and 4-gigabyte USB drive?

23 A Yes, I did.

24 Q What did Special Agent Braisted testify about the child  
25 pornography found on the black Toshiba laptop?

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1 A That he had found three videos, 594 images of child  
2 pornography and six enhancement images of child pornography.

3 Q What was Special Agent Braisted's testimony about child  
4 pornography on the 8-gigabyte?

5 A That he found 15 images of child pornography and 96  
6 videos of child pornography.

7 Q What was Special Agent Braisted's testimony regarding  
8 the child pornography on the 4-gigabyte USB drive?

9 A That he found 10 videos of child pornography, 3,250  
10 images of child pornography, and 16 enhancement images of  
11 child pornography.

12 MS. CARROLL: No further questions.

13 THE COURT: Cross-examination?

14 CROSS-EXAMINATION BY MR. GOLDSMITH:

15 Q Special Agent Willard, you did not conduct the forensic  
16 exam, correct?

17 A Correct.

18 Q And your only knowledge of the forensic examination is  
19 based upon -- withdrawn. Your testimony during this  
20 forfeiture hearing is based only upon the testimony that you  
21 heard of Special Agent Braisted, correct?

22 A Correct.

23 Q It is of no personal knowledge that you have, correct?

24 A Correct.

25 MR. GOLDSMITH: No further questions.

1 THE COURT: Anything further?

2 MS. CARROLL: No, your Honor, the government can  
3 just deliver a couple of sentences in argument.

4 THE COURT: You may step down.

5 (The witness was excused.)

6 THE COURT: Does the government intend to call any  
7 other witnesses?

8 MS. CARROLL: No, your Honor, the government does  
9 not.

10 THE COURT: Go ahead.

11 MS. CARROLL: As you'll hear in the jury  
12 instructions on the forfeiture, the property that is alleged  
13 in the forfeiture allegation is alleged to have been used to  
14 facilitate each of the counts in the indictment. First, that  
15 the black Toshiba laptop facilitated the transportation and  
16 in the second count that the two USB drives facilitated the  
17 possession of the child pornography. You heard the testimony  
18 from Special Agent Braisted that was then summarized by  
19 Special Agent Willard, those were the digital media on which  
20 the child pornography was contained, the digital media on  
21 which they were possessed and transported.

22 THE COURT: Government rests?

23 MS. CARROLL: Yes, your Honor.

24 THE COURT: Counsel?

25 MR. GOLDSMITH: Defense rests.

1           THE COURT: Okay. Very well. Ladies and  
2 gentlemen, I'm going to give you some further jury  
3 instructions on forfeiture.

4           You have found the defendant guilty of the offenses  
5 charged in Counts 1 and 2 of the indictment. You are now  
6 asked to render a verdict concerning property that the  
7 indictment alleges is subject to forfeiture by the defendant  
8 to the government. In this context, forfeiture means the  
9 giving up of ownership or interest in the property as a  
10 penalty for committing a violation of a certain federal law.

11           In this indictment, the government alleges that  
12 three items of defendant's personal property are subject to  
13 criminal forfeiture pursuant to Title 18, United States Code,  
14 Section 2253. Specifically, the indictment forfeiture  
15 allegation reads as follows: "The allegations contained in  
16 Counts 1 and 2 of this indictment are hereby realleged and  
17 incorporated by reference for the purposes of alleging  
18 forfeiture pursuant to Title 18, United States Code, Section  
19 2253. Pursuant to Title 18, United States Code, Section  
20 2253, upon conviction of an offense in violation of Title 18,  
21 United States Code, Section 2252A, the defendant, Joseph  
22 Jenkins, shall forfeit to the United States of America:

23           First, any visual depiction described in Title 18,  
24 United States Code, Sections 2251, 2251A, 2252, or 2252A, and  
25 any book, magazine, periodical, film, videotape, and other

1 matter which contains any such visual depiction, which was  
2 produced, transported, mailed, shipped, or received in  
3 violation of Title 18, United States Code, Section -- Chapter  
4 110;

5 Any property, real or personal, constituting or  
6 traceable to gross profits or other proceeds contained from  
7 such offenses;

8 And lastly, any property, real or personal, used or  
9 intended to be used or to commit or to promote the commission  
10 of such offenses and any property traceable to such  
11 property."

12 The property to be forfeited includes, but is not  
13 limited to, the following: A, Toshiba laptop, serial number  
14 78175808W; B, PNY Attache 8-gigabyte USB thumb drive; and C,  
15 PNY Attache 4-gigabyte USB thumb drive.

16 If any of the property described above as a result  
17 of any act or commission -- or omission, excuse me, of the  
18 defendant cannot be located upon the exercise of due  
19 diligence, and has been transferred or sold to or deposited  
20 with a third party, has been placed beyond the jurisdiction  
21 of the court, has been substantially diminished in value, or  
22 has been commingled with other property which cannot be  
23 divided without difficulty, the United States of America  
24 shall be entitled to forfeiture of substitute property  
25 pursuant to Title 21, United States Code, Section 853(p), as

1 incorporated by Title 18, United States Code, Section  
2 2253(b), and Title 28 United States Code, Section 2471(c);"

3 Having read the forfeiture allegation in the  
4 indictment, I will now discuss in more detail the elements of  
5 this forfeiture allegation, which the government must prove  
6 by a preponderance of the evidence.

7 Title 18, United States Code, Section 2253(a)(3)  
8 provides as follows: "A person who is convicted of an  
9 offense under this chapter involving a visual depiction  
10 described in Section 2251, 2251A, 2252, 2252A, or 2260 of  
11 this chapter or who is convicted of an offense under Section  
12 2252B of this chapter, or who is convicted of an offense  
13 under Chapter 109A, shall forfeit to the United States such  
14 person's interest in... any property, real or personal, used  
15 or intended to be used to commit or to promote the commission  
16 of such offense or any property traceable to such property."

17 I instruct you that you are bound by your previous  
18 finding that the defendant is guilty of the offenses charged  
19 in Counts 1 and 2 of the indictment. As a result, in order  
20 to satisfy its burden of proof with regard to the forfeiture  
21 allegation, the government must establish each of the  
22 following two elements by a preponderance of the evidence:

23 First, the defendant has an interest in personal  
24 property specified by the government;

25 And second, the specified property was used by the

1 defendant or intended to be used by the defendant to commit  
2 or to promote the commission of the offense charged in  
3 Counts 1 and 2 of the indictment.

4 With regard to the first element, you should not  
5 concern yourself or consider whether any person may own or  
6 have an interest in the property in question. I will resolve  
7 any such claims. Similarly, you are not to consider what  
8 might happen to the property if it's forfeited. Nor are you  
9 to consider whether the property is currently available.

10 With regard to the second element, property that  
11 was used or was intended to be used to commit or to promote  
12 the commission of an offense means property that makes the  
13 commission of the offense easier or which is used to assist  
14 in the commission of the offense. This includes, but is not  
15 limited to, property that is used or intended to be used to  
16 purchase, manufacture, transport, store, conceal, or protect  
17 the contraband used in the offense, or the persons committing  
18 the offense. Property that was used or was intended to be  
19 used to commit or facilitate the offense, excuse me, is  
20 subject to forfeiture even if only a portion of it was so  
21 used, or if it was also used for other purposes.

22 Please remember that the government's burden of  
23 proof with regard to this forfeiture allegation is not beyond  
24 a reasonable doubt but merely proof by a preponderance of the  
25 evidence. To prove something by a preponderance of the



1 evidence means to prove that it is more likely true than not  
2 true. For example, if you put the credible evidence that is  
3 favorable to the government and the credible evidence that is  
4 favorable to defendant on opposite sides of the scale, the  
5 scale would have to tip somewhat on the government's side in  
6 order for you to find the property is subject to forfeiture.  
7 However, if the scale tips in favor of the defendant or if  
8 the credible evidence appears to be equally balanced or if  
9 you cannot say on which side the credible evidence is  
10 weightier, then you must find that the property is not  
11 subject to forfeiture.

12 In making this determination, you should consider  
13 all the evidence presented on the subject during this  
14 proceeding and during the trial, regardless of who offered  
15 it. In addition, all of my previous instructions apply to  
16 this special verdict and you should evaluate the evidence and  
17 its credibility according to the instructions I gave you  
18 earlier.

19 Finally, a few words are appropriate regarding the  
20 special verdict form that has been prepared for your use.  
21 With respect to each item of property in question, the  
22 special verdict form asks you to determine whether the item  
23 is subject to forfeiture to the government. You may answer  
24 by writing the words yes or no or writing a checkmark in the  
25 space provided next to the words yes or no. You must reach a

1 unanimous verdict as to each question on the special verdict  
2 form. Once you have reached a unanimous verdict, your  
3 foreperson should fill in the special verdict form, date it,  
4 sign it, and inform the Marshal that a verdict has been  
5 reached.

6 And I will now review with you that special verdict  
7 form. It has the caption of the case, it has three  
8 questions. The first question: As to the government's  
9 forfeiture allegation in the indictment, has the government  
10 proved by a preponderance of the evidence that the Toshiba  
11 laptop, serial number 78175808W, was used or intended to be  
12 used to commit or to promote the commission of the offenses  
13 charged in the indictment, yes or no?

14 Question 2: Has the government proved by a  
15 preponderance of the evidence that the PNY Attache 8-gigabyte  
16 USB thumb drive was used or intended to be used to commit or  
17 to promote the commission of the offenses charged in the  
18 indictment, yes or no?

19 And third: Has the government proved by a  
20 preponderance of the evidence that the PNY Attache 4-gigabyte  
21 USB thumb drive was used or intended to be used to commit or  
22 to promote the commission of the offenses charged in the  
23 indictment, yes or no?

24 And like before, it has a line for the foreperson  
25 to sign and date the verdict form.

1           Are there any questions from any of the ladies and  
2 gentlemen of the jury about what you're to do with regard to  
3 this section of deliberations with regard to forfeiture?  
4 Okay. Well, then I'm going to ask you to retire to the jury  
5 room and deliberate with regard to this special verdict.

6           (Jury excused for deliberations, 1:50 p.m.)

7           THE COURT: Okay, the jury has left to deliberate  
8 on the special verdict form. Any requests or objections from  
9 the government with regard to the instructions on the  
10 forfeiture allegation?

11          MS. CARROLL: No, your Honor.

12          THE COURT: Mr. Goldsmith?

13          MR. GOLDSMITH: None.

14          THE COURT: Okay. Thank you. I'd say stay close  
15 by.

16          (Court in recess.)

17          (Open Court, Jury Out, 1:58 p.m.)

18          THE COURT: Okay, we're in the courtroom without  
19 the jury, court's received a note indicating that the jury  
20 has a verdict on the forfeiture allegation, so we're going to  
21 bring them in and we're going to take the verdict.

22          (Jury present, 1:58 p.m.)

23          THE COURT: Okay. I've received a note indicating  
24 that the jury has reached a verdict with regard to the  
25 forfeiture allegations. Again, I'm going to ask the

1 foreperson to stand and my courtroom deputy will take that  
2 verdict.

3 THE CLERK: Again in case number 5:11-CR-602,  
4 United States of America versus Joseph Vincent Jenkins,  
5 question 1, as to the government's forfeiture allegation in  
6 the indictment, has the government proved by a preponderance  
7 of the evidence that the Toshiba laptop, serial number  
8 78175808W, was used or intended to be used to commit or to  
9 promote the commission of the offenses charged in the  
10 indictment; yes or no?

11 THE FOREPERSON: Yes.

12 THE CLERK: Number 2, has the government proved by  
13 a preponderance of the evidence that the PNY Attache 8GB USB  
14 thumb drive was used or intended to be used to commit or to  
15 promote the commission of the offenses charged in the  
16 indictment; yes or no?

17 THE FOREPERSON: Yes.

18 THE CLERK: Number 3, has the government proved by  
19 a preponderance of the evidence that the PNY Attache 4GB USB  
20 thumb drive was used or intended to be used to commit or to  
21 promote the commission of the offenses charged in the  
22 indictment; yes or no?

23 THE FOREPERSON: Yes.

24 THE CLERK: Thank you.

25 THE COURT: Okay, ladies and gentlemen, that's

1 going to conclude your jury service. On behalf of the  
2 attorneys and the litigants in this case, I thank you for  
3 your time and attention. It was obvious that you were  
4 attentive, you traveled here in difficult weather, you were a  
5 great group, you made sure you were here on time, and it's  
6 much appreciated by the court and the parties. I always  
7 excuse juries personally from the jury room so I'm going to  
8 ask you to retire back to the jury room, give me a couple  
9 minutes, I have some legal things I need to discuss with  
10 these attorneys, I'll be able to excuse you personally, thank  
11 you for your service. Go ahead. Excuse me, before we do  
12 that, and I should have asked, would either party like this  
13 jury polled as with regard to the special verdict?

14 MR. GOLDSMITH: Defense requests a polling, thank  
15 you, your Honor.

16 THE COURT: Okay, I apologize for not asking. Go  
17 ahead.

18 THE CLERK: Same as last time, just going to ask  
19 each of you if your verdict is the same as the foreperson  
20 reported. With regard to questions 1, 2, and 3 answering  
21 yes, was that your verdict, Juror Number 1?

22 JUROR NO. 1: Yes.

23 THE CLERK: Juror Number 2?

24 JUROR NO. 2: Yes.

25 THE CLERK: Juror Number 3?

1 JUROR NO. 3: Yes.

2 THE CLERK: Juror Number 4?

3 JUROR NO. 4: Yes.

4 THE CLERK: Juror Number 5?

5 JUROR NO. 5: Yes.

6 THE CLERK: Juror Number 6?

7 JUROR NO. 6: Yes.

8 THE CLERK: Juror Number 7?

9 JUROR NO. 7: Yes.

10 THE CLERK: Juror Number 8?

11 JUROR NO. 8: Yes.

12 THE CLERK: Juror Number 9?

13 JUROR NO. 9: Yes.

14 THE CLERK: Juror Number 10?

15 JUROR NO. 10: Yes.

16 THE CLERK: Juror Number 11?

17 JUROR NO. 11: Yes.

18 THE CLERK: And Juror Number 12?

19 JUROR NO. 12: Yes.

20 THE CLERK: Thank you.

21 THE COURT: Okay, now you can retire to the jury  
22 room and I'll be in to excuse you. Thank you.

23 (Jury Excused.)

24 THE COURT: Okay. My courtroom deputy is going to  
25 return all original exhibits to counsel who presented them,

1 it's your responsibility to provide the Court of Appeals with  
2 any exhibits that may be required.

3 I'm going to direct the probation department to  
4 prepare and submit a presentence report and I'm going to  
5 schedule sentencing for June 17th, 2014 at 10 a.m. Counsel,  
6 the clerk will electronically file the Northern District  
7 Uniform Presentence Order. Once the presentence report is  
8 prepared, any objections to the report must be submitted in  
9 writing to probation within 14 days of receipt of the report.

10 Now, appellate statute rules, Rule 29(c) motion for  
11 judgment of acquittal after a discharge of a jury must be  
12 filed within 14 days after the jury is discharged or within  
13 such further time as the court may fix during the 14-day  
14 period.

15 Rule 33, motion for new trial, motion for a new  
16 trial based on the ground of newly discovered evidence may be  
17 made only before or within two years after the final judgment  
18 but if an appeal is pending, the court may grant the motion  
19 only on remand of the case.

20 Motion for new trial based on any other grounds  
21 shall be made within 14 days after the verdict or finding of  
22 guilt or within such further time as the court may fix during  
23 14-day period.

24 Appellate Rule 4B, appeals in criminal cases.  
25 Notice of appeal must be filed within 14 days after the entry

1 of the judgment.

2 Rule 46(c) release from custody pending sentence  
3 and notice of appeal eligibility for release pending sentence  
4 or pending notice of appeal or exploration of time allowed,  
5 and finally, notice of appeal shall be in accordance with 18  
6 U.S.C. Section 3143. The burden of establishing the  
7 defendant will not flee or pose a danger to any other person  
8 or to community rests with the defendant.

9 Okay. That concludes the court's admonishments.  
10 Anything further from the government?

11 MS. THOMSON: No, your Honor.

12 THE COURT: Mr. Goldsmith?

13 MR. GOLDSMITH: Sir, just in terms of the  
14 sentencing, your Honor, it's about four months out. Is that  
15 typical with the time frames of probation department up here?

16 THE COURT: Yes.

17 MR. GOLDSMITH: All right. Nothing further.

18 THE COURT: Okay. Thank you very much. Take care,  
19 travel safe.

20 THE CLERK: Court is adjourned.

21 (Court Adjourned, 2:03 p.m.)  
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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official  
Realtime Court Reporter, in and for the United States  
District Court for the Northern District of New York, DO  
HEREBY CERTIFY that pursuant to Section 753, Title 28, United  
States Code, that the foregoing is a true and correct  
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in the above-entitled matter and that the transcript page  
format is in conformance with the regulations of the Judicial  
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Dated this \_\_\_\_ day of \_\_\_\_\_.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR  
Official U.S. Court Reporter